IN THE

Supreme Court of the United States

DECEMBER TERM, 1915

TITLE GUARANTY AND SURETY COMPANY, of Scranton, Pennsylvania, a Corporation, and VERNON W. PLATT, Plaintiffs in Error,

vs.

STATE OF IDAHO, to and for the Use and Benefit of O. W. ALLEN et als., Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR
ON MOTIONS TO DISMISS, AFFIRM OR ADVANCE.

In error to the Supreme Court of the State of Idaho.

STATEMENT.

This cause has been regularly brought to this Court on writ of error to the Supreme Court of the State of Idaho.

This action was brought by the State of Idaho to recover damages upon the official bond of Vernon W. Platt, former Bank Commissioner of the State of Idaho, and the Title Guaranty & Surety Company, of Scranton, Pennsylvania, the surety upon his official bond, for the use and

benefit of O. W. Allen, and two hundred and eighteen other depositors of the Boise State Bank.

We have been in some doubt as to just how much of the record should be taken from the Supreme Court of Idaho to this Court. There are so many statements in the brief of the defendants in error which are outside of the record that we are in still greater doubt. It was, however, stipulated that if from oversight or omission any necessary part of the record was not included that it might thereafter be supplied (p. 42, tr. of record on Motion). It now seems that such course will be necessary.

The action arises out of the following circumstances:

On or about October 26, 1911, Bank Examiner Platt made an examination of the Boise State Bank (p. 52, tr. on Motion). It is alleged that he at that time became satisfied and knew that said bank had become insolvent and that, knowing such facts, he neglected and omitted to take possession of the books, records and assets of the bank and neglected and omitted to take charge of the bank until one month and twenty-three days later, to wit, on the 19th day of December, 1911.

At the trial and in the record before the Supreme Court and which may properly be brought here, it appeared that Platt made an examination of the Boise State Bank as stated on October 26th, 1911; that he found that it was not in good condition and notified the officers of the bank that something must be done; that the officers of the bank claimed that the bank could be put in good condition and did immediately obtain sufficient cash from another bank to bring its cash reserve to the limit

prescribed by law; that at the same time said Bank Commissioner took up the matter of the consolidation of said bank with another one of the banks in the city in order that the Boise State Bank might be liquidated and no loss ensue. That these negotiations extended until the fore part of December, 1911, at which time the negotiations failed.

The Bank Examiner then took up the matter with the Clearing House, which agreed to advance funds to the extent of $20,000.00, but this advance being found insufficient, the Bank Examiner, on the following day, acting under the statute, closed the bank. Between the period of the examination on the 26th of October, and the 19th of December, various persons had deposited funds in the bank. This suit was brought to recover the funds thus deposited between said dates.

At the trial, and as appears in the record before the State Supreme Court, the Bank Examiner testified that on the 26th day of October, the cash reserve of the bank was below the limit required by law and that apparently the bank was not in good condition but that it had not yet reached the point where he felt justified in closing it.

Two matters are brought here for the consideration of this Court:

1st. The order of the trial court denying the petition for removal to the United States Court, and

2nd. The question of the constitutionality of the banking law of the State.

PETITION FOR REMOVAL TO UNITED STATES COURT.

As will be noticed from the form of complaint, this is an action brought by the State of Idaho for the use and benefit of some two hundred and eighteen persons who were depositors in the Boise State Bank and who were citizens of the State of Idaho, the action being against Vernon W. Platt, Bank Commissioner, a citizen of Oregon, and the Title Guaranty and Surety Company of Scranton, Pennsylvania, a citizen of said last named State.

The form of the complaint is somewhat peculiar. Its title is,

> "State of Idaho, to and for the use and benefit of O. W. Allen, et al."

The opening paragraph is:

> "The plaintiff, for a first cause of action herein, to and for the use and benefit of O. W. Allen, complains and alleges:"

The prayer of the complaint is a prayer on the part of the State for judgment (p. 57, Tr. on Motion), and the judgment is:

> "Whereas, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said *plaintiff*, do have and recover of and from the said defendants, Title Guaranty & Surety Company of Scranton, Pennsylvania, and Vernon W. Platt, to and for the use and benefit of each of the following named parties, the sums in lawful money of the United States of America, set opposite their respective names, to wit:" (Here follows the list of the names and the sums set opposite to them.

No individual item is in excess of $3,000.00; the total amount, however, is $30,240.98).

The judgment, therefore, is a judgment in favor of the State for the use and benefit of certain individuals in the aggregate amounting to over $30,000.00.

It was our contention at the trial that the State was improperly made a party and that the suit should have been brought in the name of the real parties in interest.

The Supreme Court, however, held that this case came under Section 4092, Revised Codes, which reads as follows:

> "An executor or administrator or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. *A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section.*"

We insisted that there was a misjoinder of parties plaintiff in that all of the depositors were joined as plaintiffs in the complaint, but the Court held otherwise and said (top of page 91, tr. on Motion):

> "There could be no misjoinder of parties plaintiff for the *State alone was plaintiff* for the use and benefit of the depositors."

And the Court further said:

> "While the State of Idaho was not beneficially interested financially in any of the causes of action in the complaint stated, it was the proper party plaintiff under Section 4092 above quoted for the use and benefit of the depositors in the bank."

We were contending in the lower court that the parties themselves and not the State should have been made plain-

tiffs in the action but the Court held contrary to this, and to the effect as above stated, that the State under Section 4092, is the trustee of an express trust under this bond and may therefore properly sue without joining the persons for whose benefit the action is prosecuted. It was for this reason that the State was authorized to bring a single action for the entire amount and it was not upon the ground of convenience or economy.

In discussing the question of the amount in controversy, however, the Supreme Court of the State failed to take into consideration the effect of their holding that there was but a single plaintiff.

The case of *Troy Bank vs. Whitehead*, 222 *U. S.* 39, would have had a bearing upon the case, and, as we view it, entirely in our favor, if the Court had sustained our contention that the persons named, other than the State, were plaintiffs in the case. The effect of the decision as to parties plaintiff, however, made the Troy Bank case no longer applicable and the case was therefore not one in which the parties had merely joined together for convenience and economy. Instead it is a case where a single plaintiff obtains a single judgment and although the same is for the benefit of numerous other persons, the amount in controversy is the amount of the entire judgment.

We have found no case exactly like the one at bar. The bond was the common security of all of the persons for whose benefit the action was brought. There was only one breach of the bond and there was only one default or neglect of duty. The claims were not united for convenience and economy in the sense in which that phrase is used in the decisions of this Court, but were united en-

tirely on the ground that the State was the proper plaintiff in the suit under the specific statute which made the presence of the beneficiaries unnecessary. The reason therefore given by the Court for denying the federal jurisdiction did not exist.

The State is seeking to recover the entire fund deposited. The Supreme Court of the State held that the State in this case is the trustee of an express trust. We may properly consider the fund represented by the total judgment as a trust fund recovered under such trust. In such cases, the aggregate amount is to be taken in ascertaining the amount in controversy.

Handley v. Stutz, 137 *U. S.* 366; 34 *L. Ed.* 706.

See also,

Baltimore & O. S. W. R. Co. v. United States, 220 *U. S.* 94.

Kaus & American Surety Co. 199 *Fed.* 972.

Spokane V. L. & W. Co. v. Kootenai Co. 199 *Fed.* 481.

Jones v. Mutual Fidelity Co. 123 *Fed.* 506.

As to citizenship of the parties, there was no dispute at the hearing, the Bank Commissioner being at that time a citizen of Oregon, and the Surety Company a citizen of Pennsylvania. The plaintiff in the case was the State of Idaho, but the State was only a nominal plaintiff, being a trustee without any financial interest in the matter; therefore, the question of citizenship was the citizenship of the real parties in interest, they being citizens of Idaho.

It was said in the case of *City of New Orleans v. Whitney, Administrator*, 138 *U. S.* 595; 34 *L. Ed.* 1102 (1106):

> "When, however, the State, or the Governor of a State is a mere figure-head, or nominal party in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship."

See *Mexican Central Ry. Co. v. Eckman*, 187 *U. S.* 429; 47 *L. Ed.* 245 (247).

The State being the plaintiff but standing only as a trustee without any real interest in the controversy, the citizenship of those who have an actual interest controls. The necessary diversity existed in this case.

As to the amount in controversy, since the statute makes the State the trustee of an express trust and authorizes the bringing of suits without joining the beneficiaries, and the judgment running to the State for an amount exceeding $30,000.00, the amount in controversy was sufficient to give jurisdiction.

The judgment cannot be divided up into parts to defeat jurisdiction on the question of the amount in controversy.

No objection to the verification of the petition for removal was made at the time of the trial and the order denying the petition was made on the ground that the action was not properly removable to federal jurisdiction; that is to say, it was made on the merits. The verification was sufficient and was made upon the knowledge of the person making it.

Cropsey v. Sun P. & P. Ass'n, 215 *Fed.* 132.
Murray v. Southern Bell T. & T. Co. 210 *Fed.* 925.
Porter v. N. P. Ry. Co. 161 *Fed.* 773.

THE CONSTITUTIONAL QUESTION.

We urged that Section 73 of the Banking Act of the State of Idaho was unconstitutional in that it did not provide for due process of law. In passing upon the matter, the Supreme Court of the State decided as follows:

> "It is appellants' further contention that if said sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the 14th amendment of the Constitution of the United States and of Sec. 13, Art. 1, and Secs. 2 and 13, Art. 5 of the Constitution of Idaho. We are not in accord with appellants' contention. Clearly Sec. 72 of the act in question contemplates that the bank commissioner shall, under the circumstances, described therein, act under the direction of the district court. It is clear that Secs. 73 and 74 contemplate that under circumstances described in Sec. 73 he shall first take charge of the bank and then proceed in the district court to wind up its affairs."

(See also paragraph five of syllabus of case by the Court.)

It will be seen from this quotation that the constitutional question was before the court and that the court decided adversely to the construction which we claim.

The court held that Section 72 of the act contemplated that the Commissioner under the circumstances therein mentioned should act under the circumstances therein described under the direction of the district court, but in this case the question arose under Section 73 of the act which reads as follows:

> "Sec. 73. On becoming satisfied that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms on which such

deposits were received, or that any bank or trust company has become insolvent, the Bank Commissioner may forthwith take possession of the books, records and assets of every description of such bank or trust company and hold the same, and no action or proceedings shall be commenced or maintained for the recovery of the possession of said books, records and assets, or to require a lien thereon except in the proceedings of the District Court having jurisdiction over the winding up of the affairs of said bank or trust company.

"The Bank Commissioner shall at once proceed to collect all debts, dues and claims, and to sell or compound all doubtful debts, and to sell all real and personal property, on such terms as the court shall direct. Said Bank Commissioner shall pay over all money, by him received, under the order of the court."

The complaint was drawn under this section and this is the only section under which the Commissioner is authorized to act without judicial proceedings. The complaint was that he became satisfied that the bank had unlawfully refused to pay its depositors in accordance with the terms of the deposits and that it had become insolvent and it was therefore forthwith his duty to take possession of the bank. It was our contention that he could not take possession of the bank as claimed; that he could only do this under some authority given him by a court; that there must be a judicial finding and determination as to the solvency of the bank, but the Supreme Court of the State held that:

> "It is clear that Sections 73 and 74 contemplate that under circumstances described in Section 73, *he shall first take charge of the bank* and then proceed in the District Court to wind up its affairs."

This is exactly what we complain of. The Court held that the Bank Examiner had a right to seize the assets

of the bank and close it up before going into court at all and it was upon this theory that the complaint was framed. If the Bank Examiner had the right to determine whether or not the bank was insolvent, or whether it had refused to pay its depositors in a lawful manner, then the determination of such Bank Examiner would be final on those points. The only thing remaining for the District Court to do, as held by the Supreme Court in this case, would be to wind up the affairs of the bank, that is, to administer the assets taken over. The law of the State, as it stands, would place in the hands of the Bank Commissioner the entire power and authority of determining the question as to the insolvency of the bank, and the question as to whether there had been a refusal to pay the depositors and permit the Bank Examiner to seize the assets of the bank and prevent its further doing business. The statute did not provide for a notice or give an opportunity to be heard on the part of the bank and did not provide for any review of these questions by a court.

As we viewed it, the case was within the rule announced in *C. M. & St. P. R. Co. v. State of Minnesota*, 134 *U. S.* 418.

For the reason that Section 73 of the Banking Act did not provide for any notice to the bank or any judicial proceedings whatever in determining the insolvency of the bank, or whether or not it had paid its depositors in the ordinary course of business, we contend that the act was unconstitutional and that the question is fairly before this Court for determination.

A State bank is in a different position from a National bank. The National banks are instrumentalities of the Federal Government created for a public purpose and as such necessarily subject to the paramount authority of

the United States. They are in a sense a part of the treasury department.

State banks occupy no such relation to State affairs. There seem to be very few cases upon the question of the arbitrary right of a bank commissioner to close banks and none under a similar statute.

Owing to objections made to the bond given on this appeal the proceedings were delayed and the writ of error appears by inadvertance to have been issued before the petition was filed. This does not invalidate the proceedings.

In conclusion, we submit that the necessary diversity of citizenship existed and a sufficient amount in controversy was involved so that the suit should have been removed to the United States Court, and that the question is fairly raised and before this Court for consideration.

That the question of the constitutionality of the Banking Act was presented to the State Supreme Court; that the Supreme Court of Idaho held the act constitutional in respect to the matter of which we make complaint.

Respectfully submitted,

SAMUEL H. HAYS,
JOHN F. NUGENT,
PASCO B. CARTER,
Counsel for Plaintiffs in Error.

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No. 815

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Defendants in Error.

In Error to the Supreme Court of the State of Idaho

Brief of Defendants in Error and Transcript of Record on Motion to Dismiss Writ of Error, or Affirm, or Advance.

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Filed ..... 1916.

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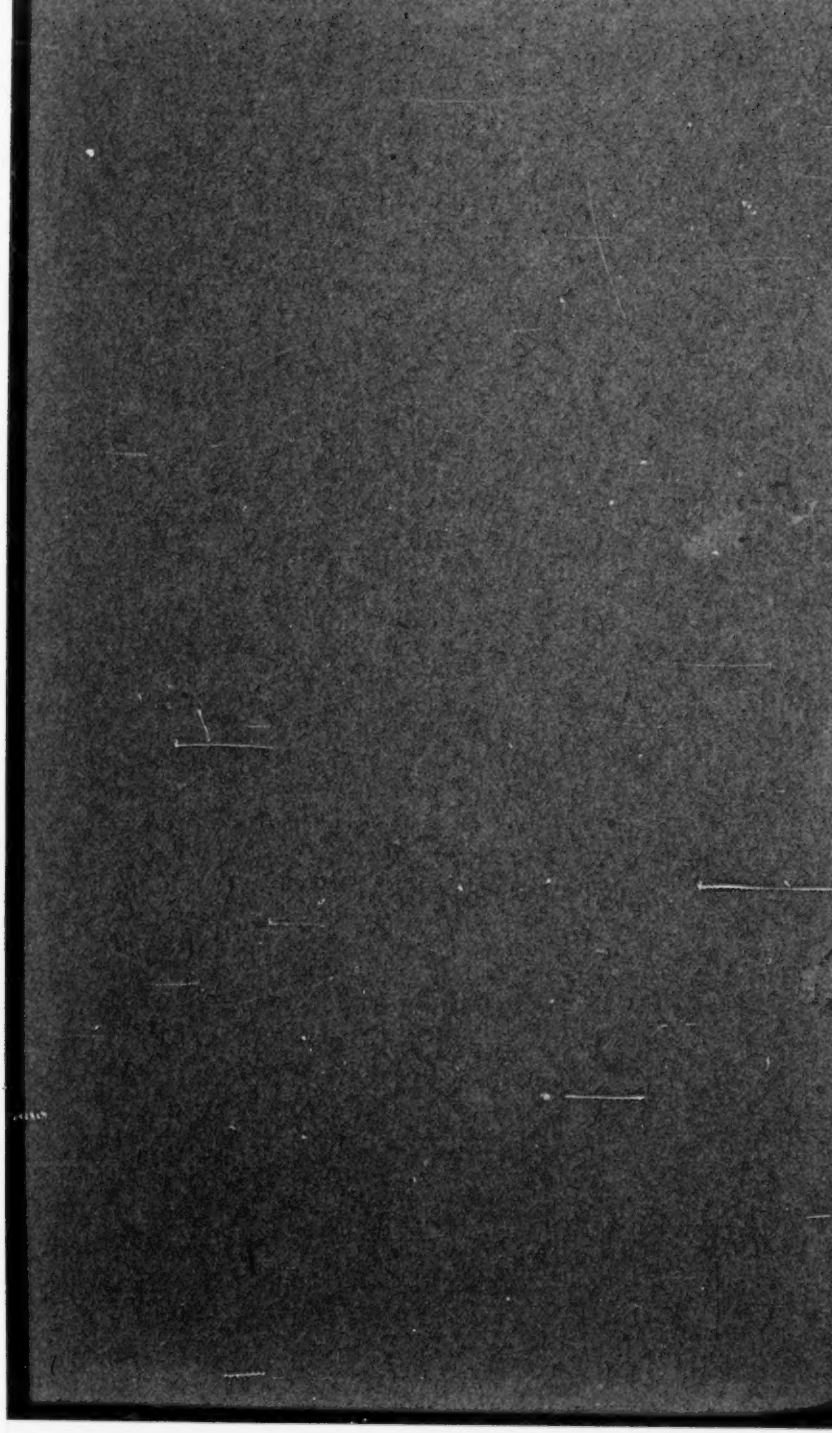

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Defendants in Error.

In Error to the Supreme Court of the State of Idaho.

United States of America
State of Idaho
County of Ada
} ss.

W. E. Cameron, Being first duly sworn, deposes and says that he is one of the attorneys of record for the defendants in error herein and resides at Boise, Idaho, that John F. Nugent, Samuel H. Hays and P. B. Carter are the attorneys of record for the plaintiffs in error and all reside at Boise, Idaho; that on the 24th day of December, 1915, at Boise, Idaho, affiant personally served on the plaintiffs in error herein the within motions to dismiss or affirm or advance and the within notice of submission of said motions, and the within brief of defendants in error and transcript of record on motions to dis-

miss writ of error, or affirm or advance, hereunto annexed, by personally delivering to, and leaving with, each of their said attorneys and counsel, to-wit, John F. Nugent, Samuel H. Hays and P. B. Carter, at Boise, Idaho, on December 24th, 1915, a true and correct copy of said motions, notice of submission, brief and transcript of record.

W. E. CAMERON.

Subscribed and sworn to before me this 24th day of December, 1915.

P. MARTIN,

(Notarial Seal) *Notary Public.*

Residence, Boise, Idaho.

(Title of Court and Cause.)

MOTIONS TO DISMISS OR AFFIRM OR ADVANCE

Come now the defendants in error herein and each of them by Joseph H. Peterson, Attorney General of the State of Idaho, Paris Martin and W. E. Cameron, their counsel, appearing in their behalf, and move the court to dismiss the writ of error herein issued to the Supreme Court of the State of Idaho for want of jurisdiction because the interests of each of the parties defendant in error in this cause are separate and distinct and do not involve an amount sufficient to give this Court jurisdiction and because the interests of each of the parties defendant in error in this cause are separate and distinct, and do not involve the amount of $3000.00, the amount necessary to be involved to have entitled the plaintiffs in error to have this cause removed to a Federal court on their petition for removal and said question and principle has been decided so often by this Supreme Court that the

same is no longer an open question in this Court and said alleged Federal removal question is manifestly lacking all color of merit and has been settled by prior decisions of this Court and does not now afford any basis for appelate jurisdiction herein and is wholly unsubstantial and does not present a real controversy.

And because no Federal constitutional question was raised in, or decided by, the Supreme Court of the State of Idaho, the court to which the writ of error herein is directed, and because the decision of a Federal constitutional question was not necessarily involved in, or necessary or essential to, the decision of the said Supreme Court of the State of Idaho, and because the plaintiffs in error did not contend in the Supreme Court of the State of Idaho that they or anyone under whom they claimed were being deprived of property without due process of law by any statute or laws whatsoever of the State of Idaho.

And because the record herein shows that the writ of error in this cause shows on its face that said writ of error was issued by a Clerk of the District Court of the United States for the District of Idaho on the 24th day of November, 1915, which date was three days prior to the date when the petition for the writ of error was filed in the Supreme Court of the State of Idaho, and three days prior to the date when said petition for a writ of error was allowed by the Chief Justice of the Supreme Court of the State of Idaho, and three days prior to the date when the assignment of errors on said writ of error were filed in the Supreme Court of the State of Idaho, and three days

prior to the date when the bond herein was either executed or filed in the Supreme Court of the State of Idaho.

And the said defendants in error and each of them, by counsel as aforesaid, also move the Court to affirm the said judgment or decree from which said writ of error purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only and that the questions upon which it is claimed that the jurisdiction of this Court and the decision of this cause depend are so frivolous as not to need further argument.

And the said defendants in error herein by their counsel aforesaid further request and ask and move this Court that, upon dismissal of the writ of error herein or upon affirmance of the judgment from which said writ of error purports to have been taken, this Court award to defendants in error the damages for delay provided for in Rule 23 of this Court.

And defendants in error herein and each of them by counsel as aforesaid also move the Court to advance this cause for hearing, in event the motions to dismiss or affirm herein should be denied, for the reason that the question here presented concerning the removability of this cause to a Federal Court is similar to that which would be presented had the cause been removed to the Federal District Court and by it remanded and either of the parties hereto had sued out a writ of error to review the ruling of that Federal court and a motion were made to advance under Rule 32, and for the further reason

that if this Court upon the hearing of said motions to dismiss or affirm should hold that the constitutionality under the Federal Constitution of the 1911 Banking Act of the State of Idaho was raised in and decided by the Supreme Court of the State of Idaho and that the decision of the question of the constitutionality of any portion of the 1911 Banking Act of the State of Idaho under the Federal Constitution was necessarily involved in, and necessary and essential to, the decision rendered by the Supreme Court of the State of Idaho, and if this Court on the hearing of the aforesaid motions should find that the plaintiffs in error did raise the question in the Supreme Court of the State of Idaho that they or anyone under whom they claimed were being deprived of property without due process of law under any provision of the 1911 Banking Act of the State of Idaho, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, then it immediately becomes a matter of the greatest public interest and concern to the State of Idaho, trustee herein, and to all the citizens and State bank depositors in said State of Idaho, that this Court should at the earliest possible moment proclaim and decide whether or not, in the particular attempted to be raised and urged by plaintiffs in error, the Banking Act of 1911 of the State of Idaho conflicts with the Fourteenth Amendment of the Constitution of the United States in that it deprives persons of property without due process of law, to the end that the State of Idaho and the citizens and State Bank depositors therein, may know what measure of protection they are entitled to expect and receive under said Banking Act of 1911 of the State of Idaho.

Furthermore, it is now four years since the bank depositors for whose use and benefit this action is brought, lost their money; litigation in this suit has already consumed over two years in spite of every effort put forth by the defendants in error to hasten the final determination of this matter and a speedy hearing should be had herein in order that this cause may not be added to the list of causes wherein a delay of justice was a denial of justice.

JOSEPH H. PETERSON,
Attorney General of the State of Idaho,
PARIS MARTIN,
W. E. CAMERON,
Residences Boise, Idaho
Counsel for Defendants in Error for the purposes of these motions.

(Title of Court and Cause.)

Notice of Submission of Motions to Dismiss or Affirm or Advance.

To the above named plaintiffs in error and to Messrs. S. H. Hays, John F. Nugent and P. B. Carter, their counsel:

Please take notice that on the 24th day of January, 1916, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is

a copy of the brief of argument to be submitted with said motions in support thereof.

JOSEPH H. PETERSON,
Attorney General of the State of Idaho,
PARIS MARTIN,
W. E. CAMERON,
Residences Boise, Idaho,
Counsel for Defendants in Error for the purposes of the Motions.

In the Supreme Court of the United States

DECEMBER TERM, 1915

TITLE GUARANTY AND SURETY COMPANY of Scranton, Pennsylvania, a Corporation, and VERNON W. PLATT,

Plaintiffs in Error,

vs.

STATE OF IDAHO to and for the use and benefit of O. W. ALLEN et als.,

Defendants in Error.

In Error to the Supreme Court of the State of Idaho.

BRIEF OF DEFENDANTS IN ERROR ON MOTIONS TO DISMISS OR AFFIRM OR ADVANCE AND TRANSCRIFT OF PORTIONS OF RECORD.

STATEMENT OF THE CASE.

This action was commenced in the District Court of the Third Judicial District of the State of Idaho in and for Ada County by the State of Idaho as plaintiff against Vernon W. Platt, former Bank Commissioner of the State of Idaho, and the Title Guaranty and Surety Company of Scranton, Pennsylvania, his surety upon his official bond, defendants, to recover damages upon that official bond for the use and benefit of O. W. Allen and 218 other depositors of the Boise State Bank who had in-

creased their deposits in said bank between the date when the defendant Bank Commissioner Platt examined the bank and became satisfied that it was hopelessly wrecked and insolvent and should have closed the bank, and the date one month and twenty-three days later, when said Bank Commissioner actually did close the bank.

A separate cause of action was stated in the complaint on behalf of each depositor. (See Trans. of Record in this book pp. 57-65.

The Supreme Court of the State of Idaho held that an action in this form might be maintained under Sections 295, 296 and 4092 of the Idaho Revised Codes reading as follows:

> "Sec. 295. Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond in his own name without an assignment thereof."

> "Sec. 296. No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought from time to time, and judgment recovered thereon by the State of Idaho, or by any person to whom a right of action has accrued, against such officer and his sureties, until the whole penalty of the bond is exhausted."

> "Sec. 4092. An executor, or adminstrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

Thus the State of Idaho, alone, was the nominal plaintiff and the names of the depositors were given to show for whose use and benefit, as trustee of an express trust under the statutes of Idaho, the State of Idaho was bringing suit. The amount in dispute in each cause of action is separate and distinct as to each cause of action. In no cause of action does the State as trustee of an express trust under the statute, for any individual depositor, ask for as much as $3000.00, exclusive of interest and costs.

In each of the 219 separate causes of action in the complaint, the amounts which the State as such trustee is asking for and has received at the hands of the trial court and jury, affirmed by the Supreme Court of the State of Idaho, is the amount which each individual depositor increased his certain deposit between the 27th day of October, 1911, the date when Platt examined the bank and found out and became satisfied that the bank was insolvent and failed to close it forthwith as provided by the statutes of Idaho, and the date one month and twenty-three days thereafter, when he finally did close the bank, as he should have done at the moment he became satisfied that the bank was hopelessly insolvent.

What each individual depositor lost by the failure of the Bank Commissioner to do his duty as provided by law and close the bank, was the amount each individual depositor had increased his deposit during the month and twenty-three days when the bank should have been closed.

The bond given by the defendant Platt upon which the Surety Company was surety, provided that the Surety Company became bound in the sum of $50,000.00 as surety

that Platt would well, truly and faithfully perform all the duties of his said office required of him by law. (See Trans. of Record, pp. 66 to 67.) in this book

The complaint alleges in substance that the defendant Platt made an examination of the Boise State Bank on the 25th, 26th and 27th days of October, 1911, and that Platt then became satisfied and knew that its capital was impaired and reduced below the amount required by law and below the amount certified to the commissioner as paid in and that he failed, neglected and omitted to require its officers to make good such impairment or deficiency; that he became satisfied and knew that it had unlawfully refused to pay one of its depositors in accordance with the terms on which the deposit was received; that he became satisfied and knew the bank was insolvent and that he failed, neglected and omitted to close the bank or to take charge of its affairs as by law provided until the 19th day of December, 1911. (See Trans. of Record, pp. 51–53). in this book

The jury found these allegations to be true, the trial court rendered judgment approving such verdict and refused plaintiffs in error motion for a new trial, and the Supreme Court of the State of Idaho has said in its opinion that "there was abundant evidence to justify the jury in reaching the conclusion that on October 27, 1911, Platt was satisfied the bank as insolvent."

The law of Idaho provides that it was Platt's duty, on becoming satisfied that the bank was insolvent to close the bank *at once*. He should have *forthwith* taken charge of the bank. It was his duty to do so. See Sections 73 and 74 of the Idaho Banking Act of 1911.

Sec. 73. "On becoming satisfied that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received, or that any bank or trust company has become insolvent, the Bank Commissioner may forthwith take possession of the books, records and assets of every description of such bank or trust company and hold the same, and no action or proceeding shall be commenced or maintained for the recovery of the possession of said books, records and assets, or to require a lien thereon except in the proceedings of the District Court having jurisdiction over the winding up of the affairs of said bank or trust company. The Bank Commissioner shall at once proceed to collect all debts, dues and claims, and to sell or compound all doubtful debts and to sell all real and personal property, on such terms as the Court shall direct. Said Bank Commissioner shall pay over all money, by him received under the order of the Court."

Sec. 74. "To carry out the provisions of Sections 72 and 73, the Bank Commissioner is hereby authorized *and it is made his duty to take charge of such bank* personally or by his deputy, or by a special deputy appointed by the Commissioner for that specific purpose. * * *."

Instead of closing the bank or taking charge thereof as it was his duty to do, or taking any other steps whatsoever to protect depositors, Platt allowed the bank to remain open for one month and twenty-three days after his examination and during that time the persons for whose benefit this action is brought, believing the bank to be solvent, deposited therein the various sums of money set out in the different causes of action in the complaint and lost the same.

The State of Idaho as trustee of an express trust, brought the action as plaintiff for each depositor and joined the

causes of action in one complaint to prevent a multiplicity of suits, (approximately 400 actions to sue Platt and then sue the Surety Company) for convenience of litigation, to save expenses, and for the reason that some of the proof on each cause of action would be the same, and because the bond ran in the name of the State, making the State the legal party plaintiff suing in the capacity of trustee of an express trust.

The reasons why the depositors for whose use and benefit this action is prosecuted, brought an action in this form is set forth in Paragraphs 13, 14 and 15 of the complaint, as follows:

XIII.

"That said bond, although payable to the State of Idaho, is, under and by virtue of the statutes of the State of Idaho, in force and obligatory upon the defendants herein, to and for the use and benefit of the above named party, who has been injured and aggrieved by the wrongful acts and default of said Vernon W. Platt in his official capacity, as aforesaid, and therefore this cause of action is brought by the State of Idaho on behalf and for the use and benefit of said party.

XIV.

"That the said State of Idaho has no interest whatever in any part of the deposit hereinbefore set forth, or claim of said party, herein made, but that the said State of Idaho is bringing said action solely for the use and benefit of said party, and the others herein, with the understanding that said party, and each of said other depositors, or his or her said assignee, or representative, has been and is now the exclusive owner of his several claims and shall remain the owner thereof; that if each of said claimants herein first sep-

arately sued Vernon W. Platt and took a judgment against him in the ordinary course of law and then if each of said claimants herein separately sued the Title Guaranty and Surety Company of Scranton, Pennsylvania, in the ordinary course of law, it would involve a multiplicity of suits, somewhere in the neighborhood of four hundred separate actions, and would unnecessarily incur large costs and expenses; that therefore, the said parties, to and for whose use and benefit this action is prosecuted, having several and distinct interests, have united their different causes of action thereon, for convenience of litigation and to save expense, in a single suit, by and in the name of the State of Idaho, obligee in said bond, to and for their uses and benefits, as set forth in the different causes of action herein.

XV.

"That said party in this cause of action, is the sole and exclusive owner of the said amount in the controversy herein, and all claims thereto, and none of the other parties to the different causes of action herein have any right or claim whatever, in or to said deposit, or the claim of this party thereto; that the party to this cause of action claims no interest whatever in or to the deposits of the other parties for whose use and benefit this action is prosecuted, or the claim made by any of them, or their assignees in their different causes of action herein; that the claims of each, in their respective causes of action herein, are separate and distinct from each other." (See Trans. of Record, pp. 55-57) in the

The trial resulted in a verdict and judgment against Platt and the Surety Company who are plaintiffs in error herein, which judgment was rendered in favor of each of the beneficiaries named in each separate cause of action, for the particular amount found to be due each depositor in each cause of action, no such amount being as much as

$3000. (See Trans. of Record in this book app. 78-80). From the judgment rendered in the trial court and from an order denying a new trial an appeal was taken to the Supreme Court of the State of Idaho, which court affirmed the judgment of the trial court. (See Trans. of Record in this book app. 83-101.)

This writ of error herein is taken to review the judgment of the Supreme Court of the State of Idaho which affirmed the above mentioned judgment of the Idaho trial court.

Two errors are alleged by the plaintiffs in error herein to have been committed by the Supreme Court of the State of Idaho. The substance of their assignments of errors is as follows: First: That the Supreme Court of Idaho erred in holding and deciding that the petition filed by the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt for the removal of this action to the District Court of the United States for the District of Idaho, Southern Division, was properly denied. * * * That the real plaintiffs in this action are the parties for whose use and benefit this action was brought, all being citizens of Idaho. That the State of Idaho is merely the nominal plaintiff and the defendants, the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt were at the time of the commencement of "the action and at the time of the filing of the petition for removal citizens of Pennsylvania and Oregon, respectively." * * *

Second, "That the Supreme Court of the State of Idaho erred in holding and deciding that said Sections 72, 73 and 74, Chap. 124, Idaho Session Laws of 1911 were not in contravention of the Fourteenth Amendment of the Con-

stitution of the United States in depriving persons of property without due process of law." (See Trans. of Record, pp. 101–103 in this book.

Plaintiffs in error attempt to raise these two questions under the following circumstances and facts appearing in the record.

Plaintiffs in error filed a petition for removal of this cause from the State trial court to the District Court of the United States for the District of Idaho, Southern Division, and alleged therein among other things that the amount in dispute exceeded the sum or value of $3000.00, exclusive of interest and costs; that the controversy was between citizens of different States, that the State of Idaho was but a formal or nominal plaintiff and that the parties for whose use and benefit the action was brought were citizens of Idaho; that the defendant Title Guaranty and Surety Company of Scranton, Pennsylvania, was a citizen of Pennsylvania, and that the defendant Platt was a citizen of Oregon." (See Trans. of Record, pp. 67–69 in this book.

The petition for removal was denied by the lower State Court and the Supreme Court of the State of Idaho affirmed the action of the lower court in denying the petition for removal and said:

> "It is true the amounts in the aggregate of the several separate causes of action, exclusive of interest and costs, are in excess of $3000, and it is also true, and it appears from the complaint, that the money claimed to be due to no individual depositor amounted to that sum.
>
> "A number of authorities are cited by appellants in support of their contention that the cause should have been removed to the Federal court, but it is believed

they are all readily distinguishable from cases of this kind. What appears to be the correct rule is stated in case of Troy Bank v. Whitehead, 222 U. S. 39, 32 Sup. Ct. 9, 56 L. Ed. 81, as follows:

" 'When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'

See also Putney v. Whitmire (C. C.) 66 Fed. 385; Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; Woodside v. Beckham, 216 U. S. 117, 30 Sup. Ct. 367, 54 L. Ed. 408; Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265, 1 Sup. Ct. 131, 27 L. Ed. 115.

"There is in this action, in one sense, a unity of interest which lies in the fact that all of the causes of action are upon the same bond and for the same breach thereof and on the same default or neglect of duty on the part of the Bank Commissioner, and the bond runs to the State of Idaho to and for the use and benefit of all parties who are aggrieved by the breach thereof, but the depositors in the bank had separate and distinct demands against appellants, none of which amounted to enough to confer jurisdiction upon the Federal court. Each of them might have brought a separate action, but it was not necessary for them to do so. The bond was given to and was made payable to the State of Idaho, the claims were united for convenience and economy, and suit was brought in the name of the State as trustee of an express trust. Therefore we conclude that the claims cannot be aggregated to make the requisite amount for federal jurisdiction.

Sections 295 and 296, Rev. Codes, provide:

" 'Sec. 295. Every official bond executed by any officer pursuant to law is in force and obligatory upon

the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof.

"'Sec. 296. No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment recovered thereon by the State of Idaho, or by any person to whom a right of action has accrued, against such officer and his sureties, until the whole penalty of the bond is exhausted.'"

"Section 4092, Rev. Codes, provides:

"'An executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

"If the other view be taken, to the effect that the State is the real party in interest and the amounts could be aggregated for the purpose of Federal jurisdiction, the jurisdiction of the Federal Court would be lacking as to diverse citizenship, since, where the State is a party the case is not removable from a State to a Federal court on the ground of diverse citizenship. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962. Where it appears that the State is a formal or nominal plaintiff only, then the citizenship of the State is not controlling as to Federal jurisdiction. It is the citizenship of the real parties in interest that controls." (See Trans. of Record, pp. 88-90 in this book.

The alleged Federal constitutional question is attempted to be raised in the following way and under the following conditions.

No constitutional question, either State or Federal, was set up by plaintiffs in error in their answer in the lower State court. That plaintiffs in error intended to make a defense based on the unconstitutionality of any statute under the State or Federal Constitution was not even hinted at by plaintiffs in error in their pleadings in the lower court. No mention of the unconstitutionality of any statute was raised or discussed by the plaintiffs in error in the progress of the trial in the State court during the introduction of testimony or in plaintiffs in error motion for a non-suit at the close of the plaintiff's evidence. At the close of all the evidence in the trial court, counsel for plaintiffs in error made a motion for a non-suit and a directed verdict which might possibly be construed to raise the point that the Idaho Banking Act of 1911 was in some way or other repugnant to the Idaho State Constitution, but by no stretch of the imagination could it be said that the point was made that any provisions of the Idaho Banking Act of 1911 was repugnant to the Federal Constitution.

The above motion for a non-suit and directed verdict made at the close of the trial is found in folios 1665-1668 in the transcript in the Supreme Court of Idaho and is in the following language:

> "Mr. Hays: If the Court please, at this time, we desire to renew our motion heretofore made for a non-suit and ask the Court upon the grounds heretofore given to grant a non-suit and further to instruct the jury to find in favor of the defendant Surety Company and also in favor of the defendant Platt, and we add the further ground, that the Legislature of the State of Idaho, if it had so intended, would have had the power or authority under the Constitution of the

State to authorize or permit the Bank Examiner to do those legislative, judicial and executive acts that may have been necessary in determining whether the bank was insolvent and thereafter close it without any judicial determination of any of those matters. That it is not within the power of the Legislature to direct or authorize the officers to act in the way that it is claimed here that he should act. We also move to strike out all of the evidence which relates to any deposits in that bank or to any transactions out of which liability might accrue prior to the 25th day of November, 1911, for this reason. We desire to raise these points: If the Commissioner was of the opinion that this bank was insolvent, under Section 72, he might give notice * * he could have the power to call the bank to make good the impairment of its capital and the bank should thereafter have thirty days in which to do this so that any loss that arose by any impairment of the capital could only be charged up against the defendant here after a period of thirty days. No other amount could be charged up against him. Further, that there is no evidence here to show that any loss accrued to the creditors or any of them by reason of the act of defendant Platt or his failure to act; in other words, the statute does not provide that he must do a certain thing, but provides that it is discretionary. Furthermore, if any claim is made under 73 of the Statute, there is no showing of any kind that this Bank Commissioner had any notice that the bank had unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received. At that time he had no notice of any such facts."

(See Trans. of Record, pp. 77-78 in this book.

Section 72 of the Idaho Banking Act of 1911 above referred to by plaintiffs in error in their motion for a non-suit and directed verdict reads as follows:

"Sec. 72. Whenever the Bank Commissioner shall become satisfied that the capital of any bank or trust company is impaired, or reduced below the amount required by law or the articles of incorporation, or below the amount certified to the Commissioner as paid in, he shall have the power to require such bank or trust company, under his hand and seal of office, to make good such impairment or deficiency. If any bank or trust company shall refuse or fail for thirty (30) days after written notice to make good such impairment of its capital, the Bank Commissioner is hereby authorized and empowered to take charge of its affairs and to wind up its business, under the direction of the Court in the Judicial District in which the bank or trust company is located. In any case where the capital of the bank or trust company shall have become impaired or reduced below the amount required by law or the articles of incorporation, the Board of Directors of such bank or trust company shall have the power to make a pro rata assessment upon all of the stock of said bank or trust company to make good such deficiency, and may provide that the amount of such deficiency shall be due and payable at a time to be fixed by such Board of directors, which time shall not be more than ten (10) days after the notice of said assessment; and if any stockholder shall fail or neglect to pay the amount of the assessment against his stock for ten (10) days after the same shall have become so due and payable, the directors of such bank or trust company may offer said stock for sale, and sell the same at public sale ten (10) days' notice to be given by posting copies of such notice of sale in five (5) public places in the town, village or city where such bank or trust company is located. Upon such sale, the purchaser shall forthwith pay the amount of the assessment against said stock. The amount received from the sale of said stock, less the cost and expense of such sale, shall be paid to the original owner of the stock."

As the Supreme Court of Idaho says in its opinion: "The appellants (plaintiffs in error herein) in the preparation of their brief have failed to conform to Rule 45 of the rules of practice in that it does not contain a distinct enumeration of the several errors relied on." (See Trans. of Record, in this book p. 87-88....) No error was assigned by the present plaintiffs in error in the Supreme Court of Idaho on the ground that any part of the Idaho Banking Act of 1911 was unconstitutional under either the State or Federal Constitutions, or that the trial court had erred in holding any part of the Idaho 1911 Banking Act constitutional over an objection that it was repugnant to either the State or Federal Constitution. Under a heading in their brief entitled "Powers of the Bank Commissioner" the plaintiffs in error in their brief in the State Supreme Court made the following assertion:

Powers of Bank Commissioner.

> "In the motion for non-suit, made at the close of the trial (f. 1665), a non-suit was asked on the ground that the Legislature, if it had so intended, would have had no power or authority under the constitution of the State and United States to authorize or permit the Bank Examiner to do the legislative, judicial and executive acts that might have been necessary in determining whether a bank was insolvent and close it without any judicial determination of these matters."

Of course this was an erroneous statement, though undoubtedly made in good faith. A reading of this motion for a non-suit or directed verdict readily discloses that the Federal Constitution or Constitution of the United States is nowhere mentioned. There is simply a discussion of the powers of the

Legislature of the State of Idaho under the *Constitution of the State of Idaho.*

In their *brief* in the Supreme Court of the State of Idaho, the fourteenth amendment to the Constitution of the United States was mentioned once and only once, and that in a paragraph reading as follows:

> "So in this case, that portion of the statute which provides for judicial proceedings in the determination of judicial matters is valid, but if Sections 72 and 73 are claimed to authorize the Commissioner to seize the property and wind up the affairs of the corporation without any judicial proceedings, then those sections are in violation of the fourteenth amendment to the Constitution of the United States, and also in violation of Section 13, Article 1 and Sections 2 and 13 of Article 5 of the Constitution of the State of Idaho."

The Supreme Court of the State of Idaho in rendering its decision referred generally to this argument advanced by plaintiffs in error, and to the construction of and mode of operation contemplated by, Sections 72, 73 and 74 of the Idaho Banking Act of 1911, and said:

> "In their motion for a directed verdict appellants also raised the question of the validity of Section 73, above quoted. They contend that the law under consideration contemplates that a court proceeding must first be instituted by the Bank Commissioner before he takes possession of the books, records, and assets of a bank or trust company found by him to be insolvent or which has unlawfully refused to pay its depositors; that the theory of respondents is, in effect, that it is the duty of the bank commissioner, upon becoming satisfied of one or more of the above-mentioned facts, to immediately take charge without instituting a proceeding in court to procure judicial authority so to do. It is appellants' further contention that, if said Sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceed-

ings, then these sections are in violation of the fourteenth amendment of the Constitution of the United States and of Section 13, Art. 1, and Sections 2 and 13, Art. 5, of the Constitution of Idaho. We are not in accord with appellants' contention. Clearly Section 72 of the act in question contemplates that the Bank Commissioner shall, under the circumstances described therein, act under the direction of the District Court. It is clear that Sections 73 and 74 contemplate that under circumstances described in Section 73 he shall first take charge of the bank, and then proceed in the District Court to wind up its affairs. It appears from the record in this case that Platt did neither of these things, but permitted the bank, without interference upon his part, although he knew it to be in an insolvent condition, to continue business for a period of one month and 23 days and to receive deposits of the persons upon whose behalf this action was prosecuted."

(See Trans. of Record p. 94 r.) 95 in this book.

Thus it clearly appears that no Federal Constitutional question was either raised or decided in the Supreme Court of the State of Idaho. Neither was it necessary for the Supreme Court of the State of Idaho to decide any Federal Constitutional question in rendering its judgment.

The plaintiffs in error in their brief simply said, "IF Sections 72 and 73 are construed to authorize the Bank Commissioner to seize the property and wind up the affairs of the bank *without any judicial proceedings, then* these sections are in violation of the fourteenth amendment to the Constitution of the United States." The Supreme Court of Idaho said that that was not the proper construction to be placed upon those Sections 72 and 73. The Supreme Court of Idaho said that judicial proceedings were provided for by these sections, and that therefore they could not be open to the objection raised by plaintiffs in error.

The Supreme Court of Idaho in its opinion said: "Clearly Section 72 of the act in question contemplates that the Bank Commissioner *shall* under the circumstances described therein, *act under the direction of the District Court. It is clear that Sections 73 and 74 contemplate* that under the circumstances described in Section 73 *he shall* first take charge of the bank and *then proceed in the District Court to wind up its affairs.*"

Plaintiffs in error said in their brief that IF Sections 72 and 73 *did not* provide for any judicial proceedings, *then* those sections would be unconstitutional. But the Supreme Court of the State of Idaho promptly said that Sections 72 and 73. when properly construed *did provide* for judicial proceedings.

Plaintiffs in error in their efforts to evade liability persisted in their attempts to misconstrue the Idaho Banking Act of 1911 as long as they were in the Idaho Courts.

Plaintiffs in error have never heretofore claimed in any court that Sections 72, 73 and 74 of the Idaho Banking Act of 1911 with the construction put upon them by the Idaho Supreme Court is unconstitutional.

But such is plaintiffs in error alleged Federal constitutional question.

Earnestly desiring to expedite the hearing of these motions, and anticipating that plaintiffs in error herein may not have their transcript filed or printed when these motions are submitted, the defendants in error have printed and incorporated in their brief herein in the latter part hereof so much of the record as will enable this Court to act understandingly on these motions without reference to the transcript and it has been stipulated and agreed by the respective parties herein that the parts of the record printed herewith are all the

parts of the record necessary for the purposes of the matters herein submitted.

The defendants in error herein will direct their argument in this brief principally against plaintiffs in error so called "removal" question and their so-called "Federal Constitutional" question.

ARGUMENT.

I.

THE CONTENTION OF THE PLAINTIFFS IN ERROR HEREIN THAT THEIR PETITION FOR REMOVAL OF THIS CAUSE TO A FEDERAL COURT SHOULD HAVE BEEN GRANTED, THOUGH IN FORM IT RAISES A FEDERAL QUESTION, IS OF SUCH AN UNSUBSTANTIAL CHARACTER AS TO CAUSE IT TO BE DEVOID OF ALL MERIT AND THEREFORE FRIVOLOUS. THE PRINCIPLE INVOLVED IN THIS QUESTION HAS BEEN SETTLED BY MANY PRIOR DECISIONS OF THIS COURT AND IS NO LONGER AN OPEN QUESTION IN THE SUPREME COURT OF THE UNITED STATES.

In order for this Court to be justified in holding that the Idaho Supreme Court committed error in affirming the action of the trial court in refusing to grant the petition of the plaintiffs in error to remove this cause to the Federal District Court, it must first appear from the record that the cause was one within the possible jurisdiction of the Federal District Court and was one which could properly have been commenced in that Federal Court.

Ex parte Wisner, 203 U. S. 449, 457.

Ex parte Winn, 213 U. S., 458.

In a civil action where diversity of citizenship is relied upon

as one of the elements to confer jurisdiction upon the Federal District Court, then another essential jurisdictional prerequisite must exist, to-wit, the matter in controversy must exceed, exclusive of interest and costs, the sum or value of $3000.

Section 24, Par. 1, New Federal Judicial Code.
Section 28, New Federal Judicial Code.

No bank depositor or use plaintiff herein, now defendants in error, sued to recover as much as $3000.00.

Assuming for the present purposes of this argument, as the plaintiffs in error would have us assume, that the various bank depositors or use plaintiffs herein should be regarded as the real plaintiffs, then the matter in controversy does not exceed the sum or value of $3000.00 unless this Court should hold that the separate, distinct and individual claims of the various bank depositors, which claims each bank depositor separately owned, and each of whose claim is set forth in a separate cause of action should be aggregated and united and added together for the purpose of making up the requisite jurisdictional amount of $3000.00, necessary to confer jurisdiction upon a Federal District Court.

The question then squarely presents itself: Can the claims of these various depositors for whom the State brings this suit as trustee, be united and aggregated and added together for the purpose of making up an amount sufficient to confer jurisdiction upon the Federal courts?

Defendants in error answer this question in the negative; that these various claims of the different bank depositors cannot be so aggregated, united and added together, and that moreover this question is no longer an open question in this

Court, but has been settled by prior decisions of this Court and is now frivolous and lacks all color of merit and that a writ of error based upon a contention to the contrary is plainly without substantial foundation and is devoid of all merit whatsoever and should be dismissed.

When the petition for removal was presented to the trial court the record then consisted of the complaint and the petition for removal. The allegations of paragraphs 13, 14 and 15 of each cause of action in the complaint stood absolutely undenied and undisputed by any contrary allegations in the petition for removal. These paragraphs have been hereinbefore set out at length.

To be sure, there was a general averment in the petition for removal that the amount in controversy in this suit exceeded the sum of $3000, exclusive of interest and costs, but this was a mere conclusion.

> See Fishback vs. W. U. Tel. Co., 161 U. S. 96, 40 L. Ed. 630.

By numerous and repeated decisions this Court and the various Federal Courts have held that under facts such as are set forth in said paragraphs 13, 14 and 15 of the complaint, the various claims of the different claimants cannot be added together and aggregated for the purpose of making up an amount requisite to confer jurisdiction upon a Federal Court, and that moreover such a question is no longer an open question.

To quote from the brief filed by the present *plaintiffs in error* in the Supreme Court of the State of Idaho: "Here the claims sued upon were deposits made by individuals in varying amounts in the Boise State Bank. These deposits

had no connection with each other. The indebtedness of the bank to the depositors was a separate indebtedness to each individual. The individuals may have had separate causes of action against the defendants (plaintiffs in error here), but clearly they have no joint cause of action."

The foregoing quotation contains the views and arguments which *plaintiffs in error* urged and pressed the Supreme Court of Idaho to adopt and which the Supreme Court of Idaho did adopt in its decision and the plaintiffs in error should now be estopped from assailing the correctness of those views and arguments. They should not be allowed to try a case upon one theory in one court and upon another and contrary theory in a higher court. Their language quoted above was used in an argument concerning joinder of causes of action. The Supreme Court of Idaho has settled the question that these causes of action may be joined in one suit and of course the statement by plaintiffs in error that the claims of the depositors were separate and distinct is as true now as when the statement was first made.

There is a long and unbroken line of authorities to the effect that when two or more parties having separate and distinct demands, as in the case at bar, are united for convenience and economy in a single suit it is essential that the demand of *each* be of the requisite jurisdictional amount and that the separate, distinct demands of the various parties can not be united, aggregated, and added together for the purpose of making up an amount sufficient to confer jurisdiction upon a Federal Court.

The general principle is thus stated in Walter vs. N. R. R. Co., 147 U. S. 370, 37 L. Ed. 206: "It is well settled in this court that when two or more plaintiffs having several inter-

ests, unite for convenience of litigation in a single suit it can only be sustained in the court of original jurisdiction or on appeal in this Court, as to those whose claims exceed the jurisdictional amount."

This principle is reiterated many times and firmly established beyond all shadow of doubt by the following cases, all holding practically to the same effect:

Putney vs. Whitmire, 66 Fed. 387; Smithson vs. Hubbell, 81 Fed. 594; Cooper vs. Preston, 105 Fed. 403; Washington Co. vs. Williams, 111 Fed. 813; McDaniel et al. vs. Traynor et al., 123 Fed. 338; Wis. Cent. Ry. Co. vs. Phoenix Ins. Co. et al., 123 Fed. 989; Eaton vs. Hoge, 141 Fed. 64; Bank vs. Whitehead, 184 Fed. 932; Auer vs. Lombard, 19 C. C. A. 295; Schwed vs. Smith, 106 U. S. 188; Freeman vs. Dawson, 110 U. S. 264; Ex Parte P. Ins. Co., 117 U. S. 367; Clay vs. Field, 138 U. S. 464; Walter vs. N. R. Co., 147 U. S. 370; N. P. R. Co. vs. Walker, 148 U. S. 391; Davis vs. Schwartz, 155 U. S. 647; Fishback vs. W. U. Tel. Co., 161 U. S. 96; Citizens Bank of L. vs. Cannon, 164 U. S. 319; N. A. T. & T. Co vs. Morrison, 178 U. S. 262; Wheless vs. St. Louis, 180 U. S. 302; Woodside vs. Beckham, 216 U. S. 117; Oliver vs. Alexander, 6 Pet. 143; Rich vs. Lambert, 12 How. 347; Seaver vs. Bigelow, 5 Wall. 208; Farmers Loan & T. Co. vs. Waterman,106 U. S. 265; Stewart vs. Dunham, 115 U. S. 61; Gibson vs. Shufeldt, 122 U. S. 27. See also State of Missouri ex rel, Barker, Atty. Gen., vs. Chicago & A. R. R., 216 Fed. 562; Troy Bank of Troy vs. Whitehead, 222 U S. 39.

There can be no bona fide argument but that this principle is directly applicable to the case at bar.

The record presented to the trial court when he denied the

petition for removal, which record plaintiffs in error have never attempted to dispute or contradict, showed that the various use plaintiffs or depositors had separate and distinct demands, that they had united in one suit merely for convenience and economy in litigation, and to save expense; that each depositor for whom a cause of action was stated was the sole and exclusive owner of his own particular claim; that none of the parties to the different causes of action had any right or claim whatever in or to the claim or deposit of any other party in any other cause of action; that each one of the various parties or depositors for whom this action was brought might have brought a separate action for himself if he had so desired; that some of the various depositors might succeed in establishing their debts in their respective causes of action while others might fail in theirs; that the success or failure of one would not affect the other; that the claims of the various depositors were joined in one suit because the depositors formed a class of parties whose rights arose out of the same transaction, though their interests were distinct; that a separate judgment was sought in each cause of action in favor of that particular depositor therein; that though there was but one suit, yet its legal aspect and effect was the same as though separate suits had been begun on each of the separate causes of action; that the relief to be granted to each depositor in the separate causes of action was separate and independent from that to be granted to any other depositor in his cause of action; each depositor had a separate debt in which no other depositor had or could have any interest; that though the effect of a judgment to be rendered would be to deprive the defendants (present plaintiffs in error) of more than $3000, yet it would be done at the suit of

several parties on several claims who might have sued separately, but whose suits had been joined in one for convenience and to save expense; that certain of the questions involved were common to all the causes of action and therefore they were as a matter of convenience all joined in one suit; that if a decision on the merits were favorable to the plaintiff no depositor would receive as much as $3000; that in the suit there was in reality a joinder of distinct causes of action, the claims being distinct and several: that the amount in dispute between any one depositor and the defendants was the sum or value of that depositor's claim without reference to the claims of others; that though there was but one suit in form, there was in reality the joinder of distinct causes of action by distinct parties arising out of a common injury; that though the aggregate of all the judgments sought on the various causes of action exceeded $3000, no depositor had any interest in the judgment sought to the extent of $3000; that the defendants had the right to contest each claim separately; that the amount of the recovery was not determined by any fixed sum, but by the aggregate of all the separate sums allowed to the several claimants or depositors individually; that the claim of no individual use plaintiff or depositor reached the jurisdictional sum or amount of $3000; that as said by plaintiffs in error in their brief in the Supreme Court of the State of Idaho "the claims sued upon were deposits made by individuals in varying amounts in the Boise State Bank. These deposits had no connection with each other. The indebtedness of the bank to the depositors was a separate indebtedness to each individual. The individuals may have had separate causes of action against the defendants, but clearly they have no joint cause of action;" that the claim of no depositor in

any cause of action reached as high as $3000.00. (See Trans. of Record, in this book pp. 55-65.)

As early as 1887, on a motion to dismiss the Supreme Court of the United States said:

> "The question presented by this motion can hardly be considered on open one."
>
> Gibson vs. Shufeldt, 122 U. S. 27.

This Court has power to award damages for delay upon dismissal of a writ of error to a State court because of the unsubstantial and frivolous character of an asserted Federal right of removal.

> See Deming vs. Carlisle Packing Co., 226 U. S. 102, 57 L. Ed. 140.

Upon the unanimous authority of all the many foregoing cases from the various Federal Courts and the United States Supreme Court defendants in error feel fully justified in saying that the asserted right of the plaintiffs in error to remove this cause to a Federal Court is too unsubstantial and frivolous to serve as the basis of a writ of error, and that therefore the writ of error should be dismissed with damages for delay.

Plaintiffs in error insist and we have assumed for the sake of argument that the bank depositors are the real plaintiffs, that each bank depositor is a plaintiff. Supposing the petition of plaintiffs in error for removal to the Federal District Court had been granted and O. W. Allen, the first named plaintiff herein, who is suing for approximately $500, had made a motion to remand to the State court on the ground that the amount in controversy between him and plaintiffs in error was less than $3000.00, how, then, could plaintiffs in error have successfully resisted such a motion?

Such a question clearly illustrates the fallacy of the position taken by plaintiffs in error.

On the other hand, if they took the ground that the State of Idaho was the real party plaintiff, then they would be confronted with the proposition that diversity of citizenship was lacking for a State is not a citizen within the meaning of removal acts.

> Stone vs. South Carolina, 117 U. S. 430, 29 L. Ed. 962.

There was another reason which might be mentioned in passing why the Supreme Court of Idaho was justified in holding that the lower Court did not err in denying the petition for removal. This reason was presented to the Idaho Supreme Court by defendants in error in the following language:

> "The new Federal Judicial Code, Section 29, requires that the petition for removal shall be *duly verified*.
>
> "In this respect the new Code differs from the old Code. Under the old Code, no verification whatever was necessary.
>
> "The petition for removal in this case was not duly verified.
>
> "The petition for removal in this case was verified by one of the attorneys for the defendants instead of being verified by either of the defendants, *and no reason whatever is set forth in the affidavit of verification why it is not made by one of the parties.* (See Trans. of Record, p. 69 in this book
>
> "Section 4199 of the Idaho Revised Codes as amended by the Session Laws of 1911, Chapter 214, pp. 687-688, requires that when any pleading 'is verified by the attorney, or any other person except one of the parties *he must set forth in the affidavit the reasons why it is not made by one of the parties.*'

"A State statute as to the verification of pleadings, regulates the verification of pleadings in similar causes in the Federal Courts.

U. S. Rev. Sts., Sec. 914.

Cottier vs. Stimson, 18 Fed. 689.

See also Encyc. of Pleading and Practice, Vol. 22, p. 1043.

"Therefore a petition for removal must be duly verified according to the requirements of due verification of pleadings as set forth in the Statutes of Idaho.

"When a party seeks to remove a case from a State to a Federal Court, he becomes the actor in that respect and the burden is on him to see that the steps which he takes are in strict conformity to the statutes.

State vs. American Surety Company, 26 Idaho, 652.

"Undoubtedly, the amendment in the new Federal Judicial Code requiring that a petition for removal must be *duly verified* was inserted by the Federal law makers in order to deter parties from attempting to remove causes to Federal Courts in bad faith and merely for delay.

"It is a substantial requirement and should be complied with.

"The present case is an illustration. In paragraph 4 of the complaint it is alleged that from the 5th day of January, 1911, until the 5th day of February, 1913, the defendant Platt was the duly appointed, qualified and acting Bank Commissioner of the State of Idaho. Paragraph 4 of the answer admits this allegation.

"The complaint was filed October 27, 1913.

"The defendant Platt was the Bank Commissioner of the State of Idaho on February 5, 1913, and necessarily a citizen and resident of Idaho on that date. In November, 1913, his counsel seek to remove a cause against him to

the Federal Court on the ground that Platt is then a citizen of the State of Oregon.

"Under such circumstances, plaintiff is entitled to have a petition *duly verified* that claims that defendant Platt was a citizen of Oregon in November, 1913; plaintiff is entitled to demand that Platt verify that allegation himself or a good reason be given why he does not do so.

"For this reason alone the lower court was justified in denying the petition to remove to the Federal Court."

Defendants in error also call the attention of this Court to the fact that the record herein shows that the writ of error was issued by the Clerk of the Federal District Court on the 24th day of November, 1915, while the assignment of errors, petition for writ of error, and bond on writ of error were not filed in the Idaho Supreme Court until November 27, 1915.

(See Trans. of Record, pp. 101-110 in this book.

A writ of error from this Supreme Court to a State Supreme Court does not issue as of right.

Spies vs. Illinois, 123 U. S. 164.

It would therefore seem that the assignment of errors should be filed in the State Supreme Court or in this Supreme Court before the writ of error is issued, as it is by examination of the assignment of errors that a judge is to determine whether or not the writ should issue.

Otherwise it might happen that a Federal District Court clerk would override the judges of the State Supreme Court and of the Supreme Court of the United States and would issue a writ of error on request of a party who was not entitled thereto.

Defendants in error urge this irregularity as a ground for dismissal of the writ of error.

II.

NO FEDERAL CONSTITUTIONAL QUESTION WAS RAISED BY PLAINTIFFS IN ERROR IN THE SUPREME COURT OF THE STATE OF IDAHO. NO FEDERAL CONSTITUTIONAL QUESTION WAS DECIDED BY THE SUPREME COURT OF THE STATE OF IDAHO. NEITHER WAS IT NECESSARY OR ESSENTIAL FOR THE SUPREME COURT OF THE STATE OF IDAHO TO DECIDE ANY FEDERAL CONSTITUTIONAL QUESTION IN RENDERING ITS JUDGMENT. THE ASSERTED FEDERAL CONSTITUTIONAL QUESTION RAISED BY PLAINTIFFS IN ERROR IS DEVOID OF ALL MERIT AND UNSUBSTANTIAL AND ABSOLUTELY FRIVOLOUS.

No Federal constitutional question was raised or mentioned by the plaintiffs in error in the Idaho trial court. Neither in demurrer, answer, objection to the introduction of evidence, motion for nonsuit, motion for directed verdict, or motion for new trial, did plaintiffs in error ever so much as even mention the Federal Constitution.

Nor did the plaintiffs in error in their brief in the Supreme Court of the State of Idaho make any assignment or specification of error to the effect that the Idaho Banking Act of 1911 was in any respect in conflict with the Federal Constitution. Their statement in their brief in the Idaho Supreme Court that they had referred to the Constitution of the United States in their motion for a directed verdict in the trial court is an error as a reading of their motion for a directed verdict hereinbefore quoted will very readily show. The only constitution referred to in this motion for a directed verdict is the Idaho State Constitution.

The only single, solitary, place in which the plaintiffs in error have ever heretofore mentioned the Fourteenth Amendment to the Constitution of the United States was in a sen-

tence, not in the record, but in their brief in the Supreme Court of Idaho in the following language.

> "But IF *Sections 72 and 73 are claimed to authorize the Commissioner to seize the property and wind up the affairs of the corporation without any judicial proceedings, then those sections are in violation of the fourteenth amendment to the Constitution of the United States, and also in violation of Section* 13, *Article* 1 *and Sections* 2 *and* 13 *of Article* 5 *of the Constitution of the State of Idaho.*"

This is the portion of appellants' brief which the Supreme Court had in mind where in rendering its judgment it says:

> It is appellants (plaintiffs in error) further contention that *if said Sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the fourteenth amendment of the Constitution of the United States and Sec.* 13, *Art.* 1, *and Secs.* 2 *and* 13. *Art.* 5 *of the Constitution of Idaho.*"
>
> (See supra quotation from decision of the Supreme Court of the State of Idaho.)

The word *if* is the vital and controlling word in the above sentence.

The Court went on to say that they did not agree that these sections should be given such a construction, but instead the Supreme Court of Idaho held that these sections did contemplate and provide for judicial proceedings. The language of the Supreme Court of Idaho immediately following the sentence from their opinion quoted above is as follows:

> "We are not in accord with appellant's contention. Clearly Section 72 of the act in question contemplates that the Bank Commissioner *shall*, under the circumstances described therein, *act under the direction of the District Court.* It is clear that Secs. 73 and 74 contem-

plate that under the circumstances described in Sec. 73 he *shall* first take charge of the bank *and then proceed in the District Court to wind up its affairs.*" . (See Trans. of Record, p. 95 in.) this book.

That is, the Court said the affairs of the bank should be wound up by judicial proceedings.

In substance, the plaintiffs in error simply said in their *brief* on appeal in the Idaho Supreme Court that if certain sections of the Idaho banking act should be construed in a certain way, then the law would violate the Federal Constitution. The Supreme Court of Idaho in its opinion said that the State banking law would not be construed in that way, and the banking law was not given the construction which appellants said if it had been given, would have rendered it repugnant to the Federal Constitution.

It is absolutely frivolous for plaintiffs in error to say that this was the decision of a Federal question.

The plaintiffs in error have never heretofore claimed that the Idaho State Banking Act with the correct construction as put upon it by the Idaho Supreme Court is unconstitutional.

They should not be allowed to make this claim for the first time on this present writ of error to the Supreme Court of the United States.

Such a practice is not permissible.

As long as they remained in the Idaho courts, plaintiffs in error persisted in misconstruing our banking law and then saying that the banking act with such a misconstruction placed upon it was unconstitutional.

They raised simply a moot abstract question of law.

They put up a straw man and knocked him down.

However, if the plaintiffs in error should now contend

that the Idaho Supreme Court did decide that a banking act which would provide that the bank commissioner should wind up the affairs of a bank *without* any judicial proceedings *would be* constitutional and not repugnant to the fourteenth amendment, and that such decision was error, then at once it becomes plainly apparent that such error was immaterial for the reason that the Idaho Supreme Court immediately said in its opinion that the Idaho Banking Act *did provide* for judicial proceedings in winding up the affairs of an insolvent bank.

The rule is well settled that in order to sustain the jurisdiction of this Court, it must appear that the decision of the Federal question claimed to be involved in the case was necessary to the determination of the cause.

Mississippi & M. Co. vs. Rock, 4 Wall. 177, 18 L. Ed. 381.

Johnson vs. Risk, 137 U. S. 300, 34 L. Ed. 683.

County of Cook vs. Calumet etc. Co., 138 U. S. 635, 34 L. Ed. 1110.

Eustis vs. Bolles, 150 U. S. 361, 37 L. Ed. 1111.

Admitting for the sake of argument that a Federal constitutional question is involved in the case, and that the Idaho Supreme Court decided a Federal constitutional question and that the decision of such Federal constitutional question was necessary to the decision rendered by the Idaho Supreme Court, yet that question is so wholly devoid of merit as to leave no room for real controversy in the matter.

> "We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of opinion that it

may go on from regulation to prohibition except upon such conditions as it may prescribe."

Noble State Bank vs. Haskell, 219 U. S. 575, 55 L. Ed. 112.

Shallenberger vs. First State Bank, 219 U. S. 114, 55 L. Ed. 114.

Assoria State Bank vs. Dolley, 219 U. S. 121, 55 L. Ed. 123.

In re Mandel, 224 Fed. 642.

State Savings Bank vs. Anderson, 165 Cal. 445.

To warrant this court in assuming jurisdiction of a case, the Federal question asserted to be involved must be "a real substantive question."

Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308, 47 L. Ed. 190.

Hamblin vs. Western Land Company, 147 U. S. 531, 37 L. Ed. 267.

Wilson vs. North Carolina, 169 U. S. 586, 595, 42 L. Ed. 865, 871.

If no Federal question was presented for decision in the State Court, or if the decision of the Federal question presented was unnecessary to the determination of the case, or was not actually decided, or if it appear that the judgment as rendered could have been given without deciding the Federal question, the Supreme Court has no jurisdiction to review the decision of the State court.

O'Neil vs. Vermont, 144 U. S. 323, 36 L. Ed. 450.

Hale vs. Akers, 132 U. S. 554, 33 L. Ed. 442.

Vandalia Ry. Co. vs. Indiana ex rel. South Bend, 207 U. S. 359, 52 L. Ed. 246.

The mere averment of a Federal question, without color of ground therefor is insufficient.

Hamblin vs. Western Land Co., 147 U. S. 531, 37 L. Ed. 267, and cases cited in note in 37 L. Ed. 267.

Mellinger vs. Hartupel, 6 Wall. 258, 18 L. Ed. 829.

New Orleans vs. New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed. 943.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336, 46 L. Ed. 936.

An assignment of error in this Court cannot be availed of to import a constitutional question into a case which the record does not show was raised in the court below and rulings asked thereon, nor can a Federal question relied upon to confer jurisdiction herein first be raised in the Supreme Court of the United States.

Quimby vs. Boyd, 128 U. S. 488, 32 L. Ed. 502.

Winona St. & R. R. Co. vs. Plainview, 143 U. S. 371, 36 L. Ed. 191.

In re Robertson, 156 U. S. 183, 39 L. Ed. 389.

Wabash R. R. Co. vs. Flannigan, 192 U. S. 29, 48 L. Ed. 328.

Montana ex rel. Haire vs. Rice, 204 U. S. 291, 51 L. Ed. 490.

Construction or misconstruction of a State statute by a State court does not raise or present a Federal question.

O'Conor vs. Texas, 202 U. S. 501, 50 L. Ed. 1120.

West. vs. Louisiana, 194 U. S. 258, 48 L. Ed. 965.

King vs. West Virginia, 216 U. S. 92.

Los Angeles etc. Co. vs. Los Angeles, 217 U. S. 217, 54 L. Ed. 736.

The decisions of the State courts as to what are the laws of the State are binding upon the courts of the United States.

Ex Parte Spies, 123 U. S. 131, 31 L. Ed. 80, 86.

Iowa Cent. Ry. vs. Iowa, 160 U. S. 389, 40 L. Ed. 467.

Leeper vs. Texas, 139 U. S. 462, 35 L. Ed. 225.

The decision of a State court construing a State statute so as to remove any question of its repugnancy to the Federal Constitution cannot be reviewed by the Supreme Court of the United States on writ of error to the State court.

Tampa Waterworks Co. vs. Tampa, 199 U. S. 241.

The plaintiffs in error never claimed that the Idaho Banking Law of 1911 deprived persons of property without due process of law in contravention to the fourteenth amendment to the Federal Constitution until they filed their petition for a writ of error to this Court and filed their assignments of error for the allowance of this writ of error.

It is not sufficient to raise the Federal constitutional question for the first time in the petition for the writ of error.

Johnson vs. N. Y. Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273.

Simmerman vs. Nebraska, 116 U. S. 54, 29 L. Ed. 535.

Warfield vs. Chaffe, 91 U. S. 690, 23 L. Ed. 383.

Clark vs. Pennsylvania, 128 U. S. 395, 32 L. Ed. 487.

Manning vs. French, 133 U. S. 186, 33 L. Ed. 582.

Butler vs. Gage, 138 U. S. 52, 34 L. Ed. 869.

The assignment of errors made for this Court, but filed in the court below at the time of the petition for the allowance of the writ of error was filed, cannot be availed to import a Federal question, or any other, into the case which the record does not show to have been raised and passed on in the court below.

Ansboro vs United States, 159 U. S. 695, 40 L. Ed. 310.

Cornell vs. Green, 163 U. S. 75, 41 L. Ed. 76.

The phrasing of plaintiffs in error second assignment of error is as follows:

> "The Supreme Court of Idaho erred in holding and deciding that said Sections 72, 73 and 74, C. 124, Session Laws of 1911 of the State of Idaho, were not in contravention of the fourteenth amendment of the United States in depriving persons of property without due process of law."

It was Platt's duty as an Idaho State official to obey the mandates of the Idaho statutes.

> "We are constrained to believe that the better rule is that all should obey the law, as it comes from the law making power, until the proper tribunal has passed upon it. Obedience to the law, as it appears when clothed with all the evidences of authority, ought not to subject the obeying citizen to punishment."

Hampton vs. Dilley, 3 Idaho, 427, 31 Pac. 807.

Surely neither of the plaintiffs in error can say that either of them was deprived of property by the Idaho Supreme Court without due process of law.

Neither of the plaintiffs in error can attack any portion of the Idaho 1911 Banking Act as unconstitutional because it might be construed to deprive a State *bank* of property without due process of law.

Such an objection could only be urged by the State bank or by some one representing or interested in the bank.

Plaintiffs in error have absolutely no interest in such a question.

Before the Supreme Court of the United States can review the decision of the State Supreme Court, the State Supreme Court must deny the Federal right set up *by the plaintiff in error in his own behalf.*

It is essential that the claim of Federal right *was denied* by the Supreme Court *to the party* who invokes the jurisdiction of the Supreme Court.

McNulte v. Lockeridge, 141 U. S. 327, 35 L. Ed. 796.
Giles v. Little, 134 U. S. 645, 33 L. Ed. 1062.
Brown v. Swart, 145 U. S. 454, 36 L. Ed. 773.
Hale v. Gaines, 22 How. 144, 16 L. Ed. 264.
Long v. Converse, 91 U. S. 105, 23 L. Ed. 233.
Phinney v. Sheppard, 177 U. S. 170, 44 L. Ed. 720.
Missouri vs. Dockery, 191 U. S. 165, 48 L. Ed. 133.

In conclusion, defendants in error earnestly insist that the many authorities cited herein prove conclusively that this writ of error is absolutely frivolous and without any color of merit, and that the writ should be dismissed or the judgment from which it was taken be affirmed, with damages for delay, and defendants in error urge this Court to take such action.

Should they fail in their foregoing request, defendants in error then ask that this case be advanced for hearing upon the grounds stated in the motion.

Respectfully submitted,

JOSEPH H. PETERSON,
Attorney General of the State of Idaho,
PARIS MARTIN,
W. E. CAMERON,

Counsel for Defendants in Error for the purposes of these motions.

In the Supreme Court of the United States

DECEMBER TERM, 1915

TITLE GUARANTY AND SURETY COMPANY, of Scranton, Pennsylvania, a Corporation, and VERNON W. PLATT,

Plainttiffs in Error.

vs.

STATE OF IDAHO to and for the use and benefit of O. W. ALLEN, et als.,

Defendants in Error.

In Error to the Supreme Court of the State of Idaho

TRANSCRIPT OF RECORD ON MOTIONS TO DISMISS WRIT OF ERROR, OR AFFIRM OR ADVANCE.

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(Title of Cause.)

IN THE SUPREME COURT OF THE UNITED STATES.

STIPULATION AS TO THE PRINTING OF RECORD.

In the above entitled cause, it is hereby stipulated and agreed by and between Samuel H. Hays, John F. Nugent and Pasco B. Carter, counsel for the plaintiffs in error herein, and Joseph H. Peterson, Paris Martin and William E. Cameron, counsel for defendants in error herein, that the portions of the record hereinafter designated shall

constitute the transcript of the record on the writ of error issued to this court from the Supreme Court of the United States in this cause to show the errors complained of.

It is further stipulated that if, from oversight or omission, any necessary part of the record be not included in the portions of the record hereinafter designated, that the plaintiffs in error shall have the right to include in the record and have printed, or may be required by defendants in error to have included in the record and have printed, any further or additional portions of the record so found to be necessary.

The portions of the record hereby designated are as follows, towit:

1. Complaint as appears in the transcript used in the Idaho Supreme Court.

2. Petition for removal.

3. Order denying petition for removal.

4. Answer as appears in transcript used in Idaho Supreme Court.

5. Motion for non-suit and directed verdict.

6. Verdict omitting all counts after count one and followed by the words, "The remaining counts of the verdict being in words and legal effect identical with this first count, except the names of the party and the amount."

7. Judgment; omitting all names and amounts after No. 1, followed with the words, "the remainder of the judgment consists of the names of the remaining use plaintiff and opposite their names the respective sums awarded to them by the verdict."

No sum awarded to any use plaintiff equals $3,000.00 but the aggregate of the sums awarded to all the use plaintiffs equals $30,240.98"

8. Notice of motion for new trial.
9. Order denying motion for new trial.
10. Notice of appeal.
11. Opinion of Idaho Supreme Court.
12. Remittitur from Idaho Supreme Court to trial court.
13. Assignment of errors.
14. Petition for writ of error.
15. Order granting writ of error.
16. Bond on writ of error.
17. Citation and acceptance of service.
18. Writ of error and its allowance.
19. Certificate of lodgment.
20. Stipulation as to printing of record.
21. Clerk's certificate of transcript.
22. Clerk's return to writ of error.

SAMUEL H. HAYS,
JOHN F. NUGENT,
PASCO B. CARTER,
Counsel for Plaintiffs in Error.
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Attorney General, State of Idaho.
MARTIN & CAMERON,
Paris Martin, W. E. Cameron,
Counsel for Defendants in Error.

(Endorsed): Filed this 14th day of December, 1915
I. W. HART, Clerk,
By F. J. Millsaps, Deputy.

COMPLAINT.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA.

State of Idaho, to and for the use and benefit of O. W. Allen, Alexander Realty Company, Pacific National Bank, a Corporation, as Assignee of E. B. Alsop, Edw. B. Allen, R. T. Ashbury, First National Bank of Idaho, a Corporation, as Assignee of Sam Almquist, O. O. Albertson, Mrs. R. E. Burney, M. O. Bushfield, T. J. Swehttam, as Assignee of A. W. Adams, Mrs. W. W. Brookins, Rosa Blutcher, Boise Loan and Home Company, a Corporation, George O. Buhn and Edward H. Buhn, copartners, as Buhn Jewelry Company,, O. C. Behrens, Alice Blodgett, Dan Barnidge, Mrs. C. A. Buchanan, W. W. Nusbaum, and Henry Quirk, Co-partners, as Boston Grocery Company, Isabelle Brennan, A. D. Clark, H. B. Cole, Central Auto Company, a Corporation, B. B. Corliss, Efton Carr, Dr. J. R. Numbers, as Assignee of R. Lon Crooks, M. S. Cobb, Mrs. Homer Clark, A. A. Casner, O. P. Christian, J. A. Boyle, Carl Dittman, Elsie Dittman, Mrs. L. L. Dibble, A. A. Danbrava, Stanley Dreuzck, John Dargunis, M. Alexander, as Assignee of J. A. Deweisse, Viola Eagleson, R. E. Emerson, E. S. Evans, Mrs.. C. S. Ergenbright, Mrs. George N. Evans, E. G. Erbes, Frank Ensign and Lewis Ensign, Co-partners as Ensign and Ensign, Edna C. Evans, First National Bank of Idaho, as Assignee of Victor Eggers,

H. A. Flary, G. B. Ferrell, J. E. Fox, J. W. Fisher, T. E. Fenlon, R. A. Goodhue, O. S. Goff, Charles W. Geiser, Mrs. G. C. Gagen, Gladys Green, Gertrude Green, Thomas Gleason, Mrs. S. A. Gilman, Harry Goble, J. V. Hawk, Al. Hentasch, H. P. Hanson, J. C. Harlan, W. A. Hollis, A. C. Hindman, Mike Hogan, H. G. Hawley, J. A. Hannum, Earl Hawk, Julia A. Hilton, Christ Hansen, First National Bank of Idaho, as Assignee of C. L. Hoalst, H. K. Silversmith, as Proprietor of "Illustrated Idaho," First National Bank of Idaho, as Assignee of W. H. Knapp, The Pacific National Bank, as Assignee of Quincy Kinney, John Krout, R. Leonardson, Mary F. Lickliter, H. K. Lee, G. H. Leet, J. F. McBirney, I. S. McKenzie, L. E. McKeith, Niels A. Moller, James Morris, Mrs. W. S. Maher, F. W. Meyerhoffer, George M. Mose, L. W. Marshall, Fred M. Moss, Carl Malmin, Mr. James Morris, and Mrs. James Morris, J. W. Mays, The Idaho National Bank, as Assignee of Them Mehleris, Natatorium Park Amusement Company, H. J. Nickles, B. F. Orr, W. H. Olin, James C. O'Brien, C. F. Peters, J. K. Paxton, Dorothy Pelton, Ada E. Pence, Peasley Transfer Company, a Corporation, Frank Popman, Claude H. Roberts, Jr., George Rukavina, Mrs. Ben Reed, Frank Robertson, Patrick Siggelin, J. Warren Smith, P. M. Southward, Bradley Sheppard, Salvation Army, a Corporation, Boise City National Bank, as Assignee of Ison Skaggs, Celika Starkovitch, J. R. Sellenberger, Alice M. Stark, Horace D. Smith, Stephen I. Lewis and Charles Scamman, co-partners, as Lewis and Scamman, J. F. Swan, Ira Shawver, J. Sheehan, A. J. Scott, First

National Bank of Idaho, as Assignee of Celia Stafford, Ed. F. Schroder, Clarence J. Towner, Pacific National Bank, a Corporation, as Assignee of Mike Tanzall, Hettie W. Upton, First National Bank of Idaho, a Corporation, as Assignee of Joe Verrille, Samuel E. Vance, Jr., M. Alexander, as Assignee of Charles Vissiere, Adelyn Woods, and J. N. Woods, A. J. Woods, Mrs. F. A. Watts, R. H. Williams, Leona Way, Trustee, Fred Wendt, W. F. Yaryan, D. L. Young, Trustee, Bert Yaryan, Mary Lanoir, Dan Dorson, Amanda Clark, Mollie Smith, Minnie Clark, Ida Finfrock Bertha Singrey, Audrey G. Davis, M. R. P. Williams, Joseph Bistolfi, Celia Stafford, Nick Checkovick, A. F. Brown, Mrs. E. A. Brambles, F. W. Galbraith, F. Jacobs, Mrs. Catherine Morey, as Assignee of F. E. Phillips, A. D. Carley, Mrs. A. M. Newcomb, as Assignee of G. O. Newcomb, George Erbes, Mazie Rounds, American Exchange National Bank, of New York, a Corporation, as Assignee of Edward Robertson, J. A. McLeod, as Assignee of Mrs. H. M. Smith, Mehl Leaf Tobacco Company, a Corporation, George A. Latham, A. J. Nickles, O. H. Yerrington, Lee Hop, W. B. Harman, W. H. Trefry, Henry Crooks, as Assignee of R. Lon Crooks, Boise City National Bank, as Assignee of Mrs. W. C. Wolfe, Lee Wing, Joe Monroe, as Assignee of D. A. Rydvall, N. J. Minton, as Assignee of Mae Madison, F. E. Swanson, Alice Sullivan, Floyd Fruit, Hop Lee, Maud Wagner, Orville Hull, Mrs. J. E. La Fountain, Susie Monlux, Clarence Mellinger, G. H. Burnstein, I. B. Joplin, L. M. Weese, Mrs. P. S. Packard, Suey Wing, Jade Calloway, Louie Fong, Venice Mitchell,

Josephine Park, K. Yamamoto, Mrs. Frank F. Baker, Mrs. J. S. Davis, I, Mano, J. A. Sheehan, A. E. Ashley, Royal Messenger Service, a Co-partneship, May Moon, Edward G. Frost, May Heath, Mrs. H. E. Nott,

Plaintiffs

vs.

Title Guaranty and Surety Company, of Scranton, Pennsylvania, a Corporation, and Vernon W. Platt,

Defendants

The plaintiff for a first cause of action herein, to and for the use and benefit of said O. W. Allen, complains and alleges:

I.

That the Title Guaranty and Surety Company of Scranton, Pennsylvania, was, at all times hereinafter mentioned and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and transacting business in the State of Idaho, under and by virtue of a compliance with the laws of said State, and qualified and authorized to transact a general surety and fidelity business.

II.

That the Boise State Bank, Limited, was at all times hereinafter mentioned and now is, a state banking corporation duly organized and existing under and by virtue of the laws of the State of Idaho, and was up to and including the 18th day of December, 1911, transacting a general banking business at the City of Boise, County of Ada and State of Idaho.

III.

That on the 19th day of December, 1911, said Boise

State Bank, Limited, closed its doors and suspended payment, and was at that time, ever since has been and now is, unable to meet the demands of its creditors in the usual and ordinary course of business or at all.

IV.

That from the first day of January, 1911, to the 5th day of February, 1913, V. W. Platt, whose full name was at all times and now is, Vernon W. Platt, one of the above named defendants, was duly appointed, qualified and acting Bank Commissioner of the State of Idaho.

V.

That said defendant Platt was on the 5th day of January, 1911, by James H. Hawley, Governor of the State of Idaho, and by and with the advice and consent of the Senate of said State, duly appointed Bank Commissioner for said State of Idaho, for a period of four years.

VI.

That on the 14th day of December, 1910, according to the form of the statutes of Idaho, in such cases made and provided, the said Vernon W. Platt, as principal, one of the above named defendants, and defendant, Title Guaranty and Surety Company, of Scranton, Pennsylvania, as surety, in consideration of a premium then paid by the State made and executed to the said State of Idaho, their certain bond or obligation in writing, conditioned among other things that the said Vernon W. Platt shall, well, truly and faithfully perform all the duties of his said office of Bank Commissioner for the State of Idaho, under the laws then in force or thereafter to be enacted during the continuance of said Vernon W. Platt in said office, and for the purpose of assuring the State of Idaho for the use and

benefit of this plaintiff, that said defendant Platt would pay any and all damages and costs that may be adjudged against him under the provisions of Chapter 12, Title 2, of the Political Code of the State of Idaho and Chapter 13, of Title 4, of the Civil Code of the State of Idaho; a copy of which bond given in pursuance of Section 191, Revised Codes of Idaho, is hereunto attached, made a part of this complaint by this reference, and marked Exhibit "A"; which said bond was duly approved by the the proper officer of the State of Idaho, and in the manner provided by law; and thereafter on the 5th day of January, 1911, said bond was filed and recorded in the office of the Secretary of State of said State of Idaho, in the manner and within the time prescribed by law; and that on the 5th day of January, 1911, the said Vernon W. Platt, before entering upon the duties of his office, executed and filed in the office of the said Secretary of State, his oath of office as required by law, and did thereupon enter upon the duties of his office, and continued to exercise the same until on or about the 5th day of February, 1913.

VII.

That under the provisions of Chapter 13, Title 4 of the said Civil Code of Idaho, it was, among other things, provided that whenever it should appear from a report or examination of any bank, after having been authorized to do or continue business under the provisions of this Chapter, that the capital of such bank is reduced by impairment or otherwise below the amount required by Section 2970 of said Revised Codes of Idaho, which in the City of Boise, Idaho, amounted to $50,000.00 worth of property at its cash value, it should be the duty of said

State Bank Commissioner to require such bank to make good the deficiency; and to give effect to such requisition, said Commissioner was given power to examine any such bank to ascertain the amount of any such impairment or reduction of capital and whether the deficiency had been made good in compliance with his requisition; and if the bank then neglected, for six months after such requisition had been made, to make good the deficiency so appearing or found to exist, or whenever the said Bank Commissioner has reasonable cause to consider such bank insolvent, he may immediately apply, in his official capacity, to the district court of the county in which such bank has its principal place of business, for the appointment of a receiver for such bank, who, if he be appointed, shall proceed to administer the assets of the bank in accordance with law. That under the provisions of Chapter 124 of the session laws of Idaho, 1911, it was provided that whenever the said State Bank Commissioner should become satisfied that the capital of any bank was impaired, or reduced below the amount required by law, or the articles of incorporation, or below the amount certified to the Commissioner as paid in, he should have the power to require such bank, under his hand and seal of office, to make good such impairment or deficiency. If any bank should refuse or fail thirty days after written notice to make good such impairment of its capital, the Bank Commissioner was authorized and empowered to take charge of its affairs and to wind up its business, under the direction of the court in the Judicial District in which the bank was located. On becoming satisfied that a bank had unlawfully refused to pay its depositors in accordance with the terms on

which such deposits were received or that a bank had become insolvent, the Bank Commissioner shoud have at once proceeded to collect all the debts, dues and claims, and to sell or compound all doubtful debts, and to sell all real and personal property on such terms as the court might have directed. The said Bank Commissioner was authorized and it was made his duty to take charge of such bank personally, or by his deputy, or by a special deputy appointed by the Commissioner for that specific purpose.

VIII.

That, notwithstanding the obligation of said bond and the duties imposed upon him by law, the said Vernon W. Platt, after the making of the said bond and while the said bond was in force and effect and during and before the expiration of his said office, as aforesaid, did not well, truly and faithfully perform all the duties of his said office then required of him by law, and has not paid any and all damages and costs that may be adjudged against him under the provisions of Chapter 13, of Title 4 of the Civil Code of Idaho, and under Chapter 124 of the Session Laws of Idaho, 1911; that furthermore, said Vernon W. Platt did not observe, fulfill and perform the conditions of said bond, but on the contrary, he wholly failed, neglected and omitted so to do, and acted unfaithfully, improperly and illegally in this:

That on or about the 26th day of October, 1911, said Bank Examiner, Vernon W. Platt, made an examination of the Boise State Bank, Limited; that on said date, the capital of said bank was impaired or reduced below the amount required by law; that on said date, the capital of

said bank had been entirely wiped out and depleted; that said Vernon W. Platt knew on or about said date, and became satisfied that the capital of said Boise State Bank, Limited, was impaired, and reduced below the amount required by law or the articles of incorporation. That on or about said date, said Vernon W. Platt knew that said capital was below the amount certified to the Commissioner as paid in, but said Vernon W. Platt there and then failed, neglected and omitted to require said Boise State Bank, Limited, under his hand and seal of office, to make good such impairment or deficiency; that said Vernon W. Platt failed, neglected and omitted to then and there take charge of the affairs of the Boise State Bank, Limited, and wind up its business as it was his duty to do, and did not take charge of its business to wind up its affairs until the 19th day of December, 1911; that on or about said 27th day of October, 1911, said Vernon W. Platt became satisfied and knew that said bank had unlawfully refused to pay one of its depositors, to-wit, one William H. Blackman, in accordance with the terms on which said deposit was received, and on or about said October 26, 1911, said Vernon W. Platt became satisfied and knew that said bank had become insolvent, but while being satisfied of such insolvency and knowing said bank to be insolvent, as aforesaid, and its capital impaired as aforesaid, Vernon W. Platt utterly failed, neglected and omitted to take possession of the books, records and assets of every description of said bank and hold the same; and utterly failed, neglected and omitted to proceed at once to collect all debts, dues and claims and to sell or compound all doubtful debts, and to sell all real and personal property on such terms as the court should direct; and utterly failed, neg-

lected and omitted to take charge of said bank either personally or by his deputy, or by a special deputy appointed by said Vernon W. Platt for that specific purpose, and did not take charge of said bank personally or by such deputy until approximately one month and twenty-three days thereafter, to-wit, the 19th day of December, 1911.

IX.

That if said Vernon W. Platt had not failed, neglected and omitted to take possession of the books, records and assets of every description of said bank, and had held the same by posting the notice on the front door of the bank, as required by law; or if said Vernon W. Platt had not failed, neglected and omitted to proceed at once to collect all debts, dues and claims and to sue or compound all doubtful debts, and to sell all real and personal property on such terms as the court should have directed; or if said Vernon W. Platt had not failed, neglected and omitted to take charge of said bank either personally or by deputy until one month and twenty-three days had elapsed from the time said Vernon W. Platt had discovered, become satisfied and knew that said bank was insolvent and its capital entirely depleted, that it would have been impossible for any one to have deposited any money with the said bank between on or about the 27th day of October, 1911, and the 19th day of December, 1911; that it was the duty of the said Vernon W. Platt not to have allowed the Boise State Bank, Limited, to have opened its doors for business on or after the 28th day of October, 1911.

X.

That by reason of the failure, neglect and omission of

the said Vernon W. Platt to perform the duties imposed upon him by law, as above said, the said bank was left open for business and running, on and after the 28th day of October, 1911, when it should have been closed and taken in charge by the said Vernon W. Platt, and that subsequent to said 27th day of October, 1911, O. W. Allen deposited in said Boise State Bank, Limited, and had on deposit therein, or due therefrom, at the time said bank closed its doors and suspended payment, as aforesaid, the sum of $523.50, in lawful money of the United States, which amount was in no way secured to said party and was net over and above any and all claims of said bank against said party; that said sum has not been paid, nor any part thereof, except the sum of $52.35, which was paid on the 9th day of April, 1913, and the further sum of $26.17, which was paid on the 1st day of July, 1913, and that the remander thereof, to-wit, the sum of $444.98, together with interest at the rate of seven per cent, per annum upon the said sum of $523.50 from the 19th day of December, 1911, to the 9th day of April, 1913, and with interest at said rate on the sum of $471.15 from the 9th day of April, 1913, up to the first day of July, 1913, and interest at the said rate on $444.98 from the 1st day of July, 1913, down to the date of judgment herein; and the same and the whole thereof is due and owing to said party.

XI.

That by reason of the failure, neglect and omission of said Vernon W. Platt to well, truly and faithfully perform the duties of his said office, as shown by the breaches of the conditions of said bond and the breaches of duty imposed upon him by law for the fulfillment of which duties said

bond was purposely given, as hereinbefore alleged and set forth, the said party suffered loss and was injured and damaged thereby in the amount specified, to which damages the said defendant Vernon W. Platt is unable to respond, and therefore, under the provisions of said bond, said defendant, Title Guaranty & Surety Company of Scranton, Pennsylvania, is bound and obligated to pay the same, and all of the same to said party.

XII.

That it would have been useless and vain for said party to have demanded from said Vernon W. Platt, that he pay the sums aforesaid due with interest as he would have refused and he was unable to do so; that said party, prior to the commencement of said action demanded of said defendant, Title Guaranty & Surety Company of Scranton, Pennsylvania, that it pay the said sums due, as aforesaid, but that said defendant refused, and still refuses to pay the same, or any part thereof, and the same is due, owing and unpaid from said defendant, Title Guaranty & Surety Company to said party as set above forth.

XIII.

That said bond, although payable to the State of Idaho, is, under and and by virtue of the statutes of the State of Idaho, in force and obligatory upon the defendants herein, to and for the use and benefit of the above named party, who has been injured and aggrieved by the wrongful acts and default of said Vernon W. Platt in his official capacity, as aforesaid, and therefore this cause of action is brought by the State of Idaho on behalf and for the use and benefit of said party.

XIV.

That the said State of Idaho has no interest whatever in any part of the deposit hereinbefore set forth, or claim of said party, herein made, but that the said State of Idaho is bringing said action solely for the use and benefit of said party, and the others herein, with the understanding that said party, and each of said other depositors, or his or her said assignee, or representative, has been and is now the exclusive owner of his several claims and shall remain the owner thereof; that if each of said claimants herein first separately sued Vernon W. Platt and took a judgment against him in the ordinary course of law and then if each of said claimants herein separately sued the Title Guaranty & Surety Company of Scranto, Pennsylvania, in the ordinary course of law, it would involve a multiplicity of suits, somewhere in the neighborhood of four hundred separate actions, and would unnecessarily incur large costs and expenses; that therefore, the said parties, to and for whose use and benefit this action is prosecuted, having several and distinct interests, have united their different causes of action thereon, for convenience of litigation and to save expense, in a single suit, by and in the name of the State of Idaho, obligee in said bond, to and for their uses and benefits, as set forth in the different causes of action herein.

XV.

That said party in this cause of action, is the sole and exclusive owner of the said amount in the controversy herein, and all claims thereto, and none of the other parties to the different causes of action herein have any right or claim whatever, in or to said deposit, or the claim of this party thereto; that the party to this cause of action claims no

interest whatever in or to the deposits of the other parties for whose use and benefit this action is prosecuted, or the claim made by any of them, or their assignees in their different causes of action herein; that the claims of each, in their respective causes of action herein, are separate and distinct from each other.

XVI.

That said party, long prior to the commencement of this action, filed with the receiver of said Boise State Bank, a claim for the amount of said deposit but that the remainder of said deposit, as above alleged, has never been paid nor any part of said remainder and interest by any of the receivers of said bank, and the amount of said remainder with interest has been wholly lost to said party.

Wherefore, the plaintiff prays judgment against the defendants in this cause of action for the sum of $444.98, together with the interest at the rate of seven per cent per annum upon the sum of $523.50 from the 19th day of December, 1911, to the 9th day of April, 1913, and with interest at said rate on the sum of $472.15 from the 9th day of April, 1913, up to the first day of July, 1913, and interest at said rate on $444.98 from the first day of July, 1913, down to the date of judgment herein, together with the costs of suit herein, and for such other and further relief as may be just and equitable.

Separate causes of action, similar to the foregoing first cause of action, are then set forth for the following named persons for the amounts set opposite their respective names, but the allegations thereof are omitted by stipulation of counsel for the parties thereto:

No. of Cause of Action	Name	Amount plus interest
2	Alexander Realty Company	$ 139.96 plus interest
3	Pacific National Bank, Assignee	166.17 " "
4	Edw. B. Allen	34.00 " "
5	R. T. Ashbury	14.09 " "
6	First National Bank of Idaho Assignee	34.00 " "
7	O. O. Albertson	111.01 " "
8	Mrs. R. E. Burney	15.52 " "
9	M. O. Bushfield	31.58 " "
10	F. J. Swehttam, Assignee	21.25 " "
11	W. W. Brookins	36.79 " "
12	Rosa Blutcher	112.36 " "
13	Boise Home and Loan Co	158.52 " "
14	Edward H. Buhn and George O. Buhn, co-partners	85.59 " "
15	O. C. Behrens	12.13 " "
16	Alice Blodgett	21.18 " "
17	Dan Barnidge	42.72 " "
18	Mrs. C. A. Buchanan	16.32 " "
19	W. W. Nusbaum and Henry Quirk, co-partners, as the Boston Grocery Company	46.13 " "
20	Isabelle Brennan	39.74 " "
21	A. D. Clark	10.24 " "
22	H. B. Cole	38.13 " "
23	Central Auto Company	75.55 " "
24	B. B. Corliss	93.50 " "
25	Efton Carr	8.50 " "
26	J. R. Numbers	187.00 " "
27	M. S. Cobb	425.09 " "

No. of Cause of Action	Name	Amount plus interest
28	Mrs. Homer Clark	21.81 " "
29	A. A. Casner.....	17.02 " "
30	O. P. Christian	67.06 " "
31	J. A. Boyle	17.10 " "
32	Carl Dittman	44.24 " "
33	Miss Elsie Dittman	15.30 " "
34	Mrs. L. L. Dibble	52.46 " "
35	A. A. Danbrava	32.81 " "
36	Stanley Dreuzck	17.00 " "
37	John Dargunis	51.00 " "
38	M. Alexander	255.00 " "
39	Viola Eagleson	9.62 " "
40	R. E. Emerson.....	107.20 " "
41	E. S. Evans	89.13 " "
42	Mrs. C. S. Ergenbright	10.12 " "
43	Mrs. George N. Evans.....	34.85 " "
44	E. G. Erbes.....	21.13 " "
45	Ensign & Ensign	22.58 " "
46	Edna C. Evans	29.75 " "
47	First National Bank of Idaho Assignee	59.50 " "
48	H. A. Flary	61.16 " "
49	G. B. Ferrell	253.87 " "
50	J. E. Fox	804.34 " "
51	J. W. Fisher	106.25 " "
52	T. E. Femlon	17.43 " "
53	R. A. Goodhue	8.80 " "
54	O. S. Goff	27.20 " "
55	Charles W. Geiser	21.25 " "
56	Mrs. G. C. Gagen	144.50 " "
57	Gladys Green	58.22 " "

No. of Cause of Action	Name	Amount plus interest
58	Gertrude Green	84.15 " "
59	Thomas Gleason	85.00 " "
60	Mrs. S. A. Gilman	21.33 " "
61	Harry Goble	144.13 " "
62	J. V. Hawk	21.25 " "
63	Al Hentasch	353.26 " "
64	H. P. Hansen	64.64 " "
65	J. C. Harlan	32.66 " "
66	W. A. Hollis	51.00 " "
67	A. C. Hindman	73.71 " "
68	Mike Hogan	25.50 " "
69	H. G. Hawley	130.56 " "
70	J. A. Hannum	59.22 " "
71	Earl Hawk	91.80 " "
72	Julia A. Hilton	922.25 " "
73	Christ Hansen	25.50 " "
74	First National Bank of Idaho, a Corporation, Assignee	46.41 " "
75	H. K. Silversmith	177.01 " "
76	First National Bank of Idaho, a Corporation, Assignee	68.94 " "
77	John Krout	85.00 " "
78	R. Leonardson	10.27 " "
79	Mary F. Lickliter	34.85 " "
80	H. K. Lee	141.37 " "
81	G. H. Leet	50.21 " "
82	J. F. McBirney, Treasurer,	40.38 " "
83	I. S. McKenzie	1705.70 " "
84	L. E. McKeith	63.75 " "
85	Neils A. Moller	160.33 " "
86	James Morris	298.29 " "

No. of Cause of Action	Name	Amount plus interest		
87	Mrs. W. S. Maher	349.52	"	"
88	F. W. Meyerhoffer	77.35	"	"
89	Geo. M. Mose	12.75	"	"
90	L. W. Marshall.....	54.13	"	"
91	Fred M. Moss	32.30	"	"
92	Carl Malmin	22.95	"	"
93	Mr. James Morris and Mrs. James Morris	17.00	"	"
94	J. W. Mays	90.10	"	"
95	Idaho National Bank, Assignee	51.00	"	"
96	Natatorium Park Amusement Company	87.65	"	"
97	H. J. Nickles	26.78	"	"
98	B. F. Orr	12.75	"	"
99	W. H. Olin	99.58	"	"
100	James C. O'Brien	110.93	"	"
101	C. F. Peters	1355.93	"	"
102	J. K. Paxton	174.25	"	"
103	Dorothy Pelton	8.50	"	"
104	Ada E. Pence	46.75	"	"
105	Peasley Transfer Company ..	312.65	"	"
106	Frank Popman	62.78	"	"
107	Claude H. Roberts, Jr.....	56.74	"	"
108	George Rukavina	59.50	"	"
109	Mrs. Ben Reed	837.54	"	"
110	Frank Robertson	10.20	"	"
111	Patrick Siggelin	95.20	"	"
112	J. Warren Smith.....	1656.35	"	"
113	Jess Shawver	17.51	"	"
114	P. M. Southward	14.45	"	"
115	Bradley Sheppard	85.00	"	"

No. of Cause of Action	Name	Amount plus interest		
116	Salvation Army, a corp.....	122.17	"	"
117	Boise National Bank, Assignee,	36.67	"	"
118	Celika Starkovitch	85.00	"	"
119	J. R. Sollenberger	106.25	"	"
120	Alice M. Stark.....	8.50	"	"
121	Horace D. Smith	374.00	"	"
122	Stephen I. Lewis and Charles Scamman, co-partners	138.21	"	"
123	J. F. Swan	12.75	"	"
124	Ira Shawver	17.00	"	"
125	J. Sheehan	85.00	"	"
126	A. J. Scott	113.19	"	"
127	First National Bank of Idaho, Assignee	65.67	"	"
128	Ed. F. Schorder	12.20	"	"
129	Clarence J. Towner	29.20	"	"
130	Pacific Nat. Bank, Assignee ..	127.50	"	"
131	Hettie W. Upton	25.52	"	"
132	First National Bank of Idaho, a Corporation, Assignee ...	110.50	"	"
133	Samuel E. Vance, Jr.	124.61	"	"
134	M. Alexander, Assignee	68.00	"	"
135	Adelyn and J. N. Woods.....	53.61	"	"
136	A. L. Woods	33.73	"	"
137	Mrs. F. A. Watts	19.55	"	"
138	R. H. Williams, Treasurer ...	53.98	"	"
139	Leonard Way, Trustee	42.50	"	"
140	Fred Wendt	149.40	"	"
141	W. F. Yaryan.....	145.61	"	"
142	B. L. Young, Trustee	150.57	"	"
143	Bert Yaryan	127.50	"	"

No. of Cause of Action	Name	Amount plus interest
144	Mary Lanoir	76.50 " "
145	Dan Dorsan	127.50 " "
146	Amanda Clark	85.00 " "
147	Mollie Smith	382.50 " "
148	Minnie Clark	17.00 " "
149	Ida Finfrock	85.00 " "
150	Bertha Singrey	25.50 " "
151	Audrey G. Davis	42.50 " "
152	N. R. P. Williams	342.55 " "
153	Joseph Bistolfi	1275.00 " "
154	Celia Stafford	340.00 " "
155	Celia Stafford	85.00 " "
156	Bertha Singrey	8.50 " "
157	Nick Chekovitch	510.00 " "
158	A. F. Brown	170.00 " "
159	Amanda Clark	85.00 " "
160	Minnie Clark	8.50 " "
161	Mrs. E. A. Brambles	233.75 " "
162	F. W. Galbraith, Assignee	85.00 " "
163	F. Jacob	21.25 " "
164	Mrs. Katherine Morey	10.63 " "
165	A. D. Carley, Assignee	21.25 " "
166	Mrs. A. M. Newcomb, Assignee	21.25 " "
167	George Erbes	106.25 " "
168	Mazie Rounds	8.50 " "
169	American Exchange National Bank	85.00 " "
170	J. A. McLeod, Assignee	45.90 " "
171	Mehl Leaf Tobacco Company	110.77 " "
172	George A. Latham	12.75 " "
173	A. J. Nickles	19.04 " "

No. of Cause of Action	Name	Amount plus interest
174	O. H. Yerrington	8.50 " "
175	Lee Hop	82.28 " "
176	W. B. Harman	17.68 " "
177	W. H. Trefry	27.16 " "
179	Henry Crooks, Assignee.....	42.50 " "
180	F. W. Galbraith.....	38.25 " "
181	Boise City National Bank Assignee	85.00 " "
182	Lee Wing	63.06 " "
183	Mary Lamoir	425.00 " "
184	Joe Monroe	8.50 " "
185	Joe Monroe	4.25 " "
186	N. J. Minton	63.75 " "
187	F. E. Swanson	127.50 " "
188	A. J. Scott	21.25 " "
189	A. J. Scott	255.00 " "
190	Alice Sullivan	12.75 " "
191	Floyd Fruit	10.20 " "
192	Hop Lee	221.00 " "
193	Mrs. Maud Wagner.....	21.25 " "
194	Orville Hull	17.00 " "
195	Mrs. J. E. LaFountain	10.15 " "
196	Susie Monlux	63.75 " "
197	Clarence Mellinger	17.00 " "
198	G. H. Burnstein	89.25 " "
199	I. B. Joplin	27.20 " "
200	L. M. Weese	46.75 " "
201	Mrs. P. S. Packard	13.41 " "
201	Wing Suey	22.40 " "
203	Jade Calloway	11.60 " "
204	Louie Fong	25.50 " "

No. of Cause of Action	Name	Amount plus interest
205	Venice Mitchell	14.45 " "
206	Josephine Park	17.00 " "
207	K. Yamamoto	93.68 " "
208	Mrs. Frank F. Baker	8.50 " "
209	Mrs. J. L. Davis	23.12 " "
210	I. Mano	42.50 " "
211	J. A. Sheehan	45.27 " "
212	A. E. Ashley	146.63 " "
213	Royal Messenger Service, a co-partnership	33.87 " "
214	Mrs. May Moon	29.75 " "
215	Edward G. Frost	89.25 " "
216	John Dargunis	34.00 " "
217	May Heath	25.50 " "
218	Mrs. H. E. Nott	14.08 " "
219	Pacific National Bank, a Corporation, Assignee	20.57 " "

J. H. PETERSON,
Attorney General of the State of Idaho.
MARTIN & CAMERON,
Attorneys for Plaintiff,
Residence; Boise, Idaho.

(Duly Verified.)

I hereby accept service of the foregoing complaint for the Title Guaranty and Surety Company one of the above named defendants, at Boise, Idaho, this 27th day of October, 1913.

E. F. VANVALKENBURG,
Insurance Commissioner of the State of Idaho.

Exhibit "A."

OFFICIAL BOND OF VERNON W. PLATT.

Bond No. 7778.

Know all men by these preesnts: That I, Vernon W. Platt, the undersigned, as principal, and the undersigned as surety, are jointly and severally held and firmly bound unto the State of Idaho in the penal sum as follows, to-wit: Vernon W. Platt, the said principal, in the sum of fifty thousand ($50,000.000) dollars, The Title Guaranty & Surety Company, Scranton, Penna., a corporation duly authorized to do a surety business in the State of Idaho, the said surety in the sum of fifty thousand ($50,000.00) dollars; for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

To which we have affixed our hands and seals on this 14th day of December, 1910.

The condition of the above bond is such, that, whereas, the above bound principal, was on the 2nd day of January, 1911, duly appointed to the office of State Bank Commissioner in the State of Idaho.

Now, therefore, the condition of this obligation is such that if the said Vernon W. Platt shall well, truly and faithfully perform all the duties of his said office, now required of him by law, and also all such additional duties as may be hereafter imposed by any law enacted and in force in the State of Idaho during his continuance in such office, without fraud, deceit or oppression, and the said Vernon W. Platt shall pay over, in accordance with the requirements of the statutes of the State of Idaho, all moneys that may

come into his hands by virtue of his said office, and shall deliver to his successor, in such office, all writs, papers, and other things pertaining to his said office, which may by law be required to be so turned over, then the above bond shall be void, otherwise to be and remain in full force and effect.

Principal, VERNON W. PLATT. (Seal.)
THE TITLE GUARANTY & SURETY COMPANY.
By GORDON SCOTT, its attorney in fact.
Witnessed by H. A. BURNHAM (Seal).
Endorsed.

Official bond of Vernon W. Platt, as State Bank Commissioner approved this 5th day of January, 1911. JAMES H. HAWLEY.

I hereby certify that this instrument was filed for record at 10 minutes past 11 o'clock A. M., this 5th da yof January, 1911, in my office, and duly recorded in book B of Official Bonds at page 180.

W. L. GIFFORD, Secty. of State.
By B. E. HYATT, Chief Clerk.

(Endorsed): Filed Oct. 27, 1913, at 2:40 p. m.
STEPHEN UTTER, Clerk.
By OTTO F. PETERSON,
Deputy Clerk.

(Title of Court and Cause):

PETITION FOR REMOVAL.

Your petitioners, the Title Guaranty and Surety Company of Scranton, Pennsylvania, and Vernon W. Platt, respectfully show to this honorable court that they are the defendants in this suit; that this suit is of a civil nature and

that the matter and amount in dispute in this cause exceeds the sum or value of $3,000.00 exclusive of interests and costs.

That the controversy herein is between citizens of different states; that the plaintiff herein, the State of Idaho, is a formal or nominal plaintiff, and that the beneficial right of action is in O. W. Allen and other parties stated in the complaint for whose use and benefit the suit is prosecuted. That the parties for whose use the suit is prosecuted were at the time of the commencement of this suit and still are citizens of the State of Idaho;

That this suit is brought in the name of the State on the relation or for the use of the persons therein named in the complaint and that the State is merely a formal or nominal party.

That your petitioner, the Title Guaranty and Surety Company of Scranton, Pennsylvania, one of the defendants herein, was at the time of the commencement of this suit and still is a citizen of the State of Pennsylvania, being a corporation organized and existing under the laws of said State;

That Vernon W. Platt, one of the defendants herein, was at the time of the commencement of this suit and still is a citizen of the State of Oregon.

That the parties for whose use and benefit this suit is brought were at the time of the commencement of this suit and still are citizens of the State of Idaho;

That the suit herein is of a civil nature and that the value of the matter in controversy herein exceeds the sum of $3,000.00, exclusive of interest and costs.

Your petitioners herewith file a good and sufficient

bond under the statute in such cases made and provided, conditioned as the law directs, and that they will within thirty days from the filing of the petition and the removal herein, file a certified copy of the record of the case in the District Court of the United States for the District of Idaho, Southern Division, and for the payment of all costs which may be awarded by said court if the said District Court shall determine that this suit was improperly or wrongfully removed thereto.

Your petitioners therefore pray the court that it proceed no further herein except to order the removal, accept the bond herewith presented and direct a transcript of the record to be made and certified as provided by law.

J. F. NUGENT, S. H. HAYS & P. B. CARTER, attorneys for petitioners, residing at Boise, Idaho.

State of Idaho,

County of Ada—ss.

P. B. Carter being first duly sworn deposes and says that he is one of the attorneys for the petitioners herein; that the allegations of said petition are true of his own knowledge except such as are therein stated to be on information or belief, and that such matters he believes to be true.

P. B. CARTER.

Subscribed and sworn to before me this 12th day of November, 1913.

(Seal) P. MARTIN. Notary Public.

(Endorsed):

Filed Novr. 13th, 1913.

STEPHEN UTTER, Clerk.
By THOMAS E. POWELL, Deputy Clerk.

(Title of Court and Cause):

ORDER DENYING PETITION FOR REMOVAL.

The defendants in this cause of action, having on the 13th day of November, 1913, filed herein their petition and bond to remove this cause to the District Court of the United States, in the District of Idaho, Southern Division, and the hearing upon said petition and request for an order for removal of said cause, coming on to be heard on the 15th day of November, A. D. 1913, at 10:00 o'clock A. M. of said day, in pursuance of a regular and due setting of said petition and motion to be heard: Messrs. Martin & Cameron, appearing for the plaintiffs, and Messrs. S. H. Hays and P. B. Carter, appearing for the defendants, the petition for removal being presented to the court and argument in support of said petition being carefully made by Mr. S. H. Hays on behalf of defendants, and argument opposing said petition for removal being made by Messrs. Martin & Cameron, on behalf of plaintiffs, the said oral arguments, and the authorities cited by respective counsel, and the pleadings and files in the action having been duly considered by the court and taken under advisement and it now appearing to the court therefrom, that the defendants are not entitled to the order of removal prayed for in its said petition in said action and that said action is one that is not properly removable to federal jurisdiction of the said United States District Court, and the court being fully advised in the premises:

It is hereby ordered, that said petition and application on behalf of said defendants, be, and the same is hereby

denied. Done in open court this 1st day of December, 1913.

CHARLES P. McCARTHY,
District Judge.

(Endorsed):

Filed Dec. 1, 1913.

STEPHEN UTTER, Clerk.
By B. CLYDE EAGLESON, Deputy Clerk.

(Title of Court and Cause):

ANSWER.

Comes now the defendants answering the first cause of action herein and state:

1.

Admit that the Title Guaranty and Surety Company, of Scranton, Pennsylvania, was at all the times mentioned in the complaint and now is a corporation as stated in paragraph one of the first cause of action of the complaint herein.

2.

Admit that the Boise State Bank, Limited, was at the times mentioned in the complaint a State banking corporation organized and existing under the laws of the State of Idaho as stated in the complaint herein.

3.

Defendants admit the allegations contained in paragraph three of the first cause of action of the complaint herein.

4.

Defendants admit the allegations contained in paragraph

four of the first cause of action of the complaint herein.

5.

Defendants admit the allegations contained in paragraph five of the first cause of action of the complaint herein.

6.

Defendants admit the execution of the bond, Exhibit "A", a copy of which is attached to the complaint herein.

Defendants deny that said bond was given for the purpose of assuring the State of Idaho for the use and benefit of the other plaintiffs herein for any or all damages or costs that might be adjudged against the defendant, Vernon W. Platt, under the provisions of Chapter 12, Title 2, of the Political Code of the State of Idaho, or Chapter 13, Title 4 of the Civil Code of the State of Idaho, or any other provisions of the laws of the State of Idaho.

7.

That the matters and thing set up in paragraph seven of the complaint herein are an attempted recital in part of the laws of the State relative to banking and that insofar as the law is correctly set up, defendants admit the same, and insofar as it is not correctly set forth, defendants deny the same.

8.

Defendants deny that the said Vernon W. Platt, after the making of said bond, Exhibit "A", attached to the complaint herein, and while the same was in force and effect and during his term of office, did not well, truly and faithfully perform the duties of his office and deny that he has not paid any and all damages and costs that have been adjudged against him under the provisions of the laws of the

State of Idaho, and deny that said Vernon W. Platt did not observe, or fulfill, or perform the conditions of said bond and deny that he wholly failed, or neglected, or omitted so to do, or that he acted unfaithfully, improperly or illegally in any respect whatever, and defendants deny that the capital of the said Boise State Bank, Limited, was on or about the 26th day of October, 1911, at the time of the examination of the said bank made by the said Bank Examiner, Vernon W. Platt, impaired or reduced below the amount required by law; deny that on said date the capital of said bank had been entirely wiped out or depleted; deny that said Vernon W. Platt knew on or about said date, or became satisfied that the capital of said Boise State Bank, Limited, was impaired or reduced below the amount required by law, or the articles of incorporation; deny that on or about said date, said Vernon W. Platt knew that the said capital was below the amount certified to the Commissioner as paid in.

Deny that the defendant, Vernon W. Platt, failed or neglected to do any matter or thing in regard to the Boise State Bank, Limited, which it was his duty to do; deny that on or about the 27th day of October, 1911, said Vernon W. Platt became satisfied or knew that said bank had unlawfully refused to pay one of its depositors, to-wit, one William H. Blackman, in accordance with the terms on which said deposit was received;

Deny that on or about October 26th, 1911, said Vernon W. Platt became satisfied or knew that said bank had become insolvent; deny that said Vernon W. Platt, while being satisfied of such insolvency, or knowing said bank to be insolvent, or knowing its capital to be impaired, failed

or neglected or omitted to take possession of the books and records and assets of said bank.

9.

Defendants deny that it was the duty of the said Vernon W. Platt not to have allowed the Boise State Bank, Limited, to have opened its doors for business on or after the 28th day of October, 1911, and deny all of the other allegations contained in paragraph nine of the complaint herein, and defendants further deny that said Vernon W. Platt did in any manner or at all neglect or fail to perform any duty incumbent upon him.

10.

Defendants deny that by reason of the failure or neglect or omission of the said Vernon W. Platt to perform the duties imposed upon him by law, that the said bank was left open for business and running on after the 28th day of October, 1911, when it should have been closed and taken in charge by said Platt, and defendants, upon information and belief, deny that subsequent to the 27th day of October, 1911, O. W. Allen deposited in said Boise State Bank, Limited, and had on deposit therein or due therefrom at the time said bank closed its doors and suspended payment as aforesaid the sum of five hundred twenty-three and fifty hundredths ($523.50) dollars, lawful money of the United States, which amount was in no way secured to said party and was not over and above any and all claims of said bank against said party; deny that said sum has not been paid, or any part thereof except as alleged in the complaint and deny that the sum of four hundred forty-four and ninety-eight hundredths ($444.98) dollars, or any part

thereof, together with interest as specified in the complaint, is due or owing to said party.

11.

Deny that by reason of the failure or neglect or omission of said Vernon W. Platt to well, truly and faithfully perform the duties of his office, that the said plaintiff mentioned in the first cause of action suffered loss, or was injured, or was damaged thereby in the amount set forth in said first cause of action, or in any other amount or at all, and deny that the said defendant, the Title Guaranty and Surety Company of Scranton, Pennsylvania, is bound or obligated to pay the same, or any part thereof to the said party mentioned in the first cause of action of the complaint herein.

12.

Defendants admit the allegations contained in paragraph twelve of the first cause of action.

13.

Defendants deny that the said bond, a copy of which, "Exhibit A", is attached to the complaint herein, is under or by virtue of the statutes of the State of Idaho, in force or obligatory upon the defendants herein or either of them, to or for the use or benefit of the plaintiff named in the first cause of action herein, or that said plaintiff has been injured or aggrieved by the wrongful acts or default of the said defendant, Vernon W. Platt, in his official capacity as aforesaid.

14.

Defendants deny that in the ordinary course of law it would involve a multiplicity of suits, or would unneces-

sarily incur large costs and expenses if actions were brought as set forth in paragraph fourteen of the complaint herein.

15.

That defendants have no knowledge, information or belief sufficient to enable them to answer the matters set forth in paragraph fifteen of the first cause of action of the complaint herein, and therefore, denies the same.

16.

Defendants deny that the amount of the balance claimed to be due to the plaintiff herein named in the first cause of action has been wholly or at all lost to him.

Come now the defendants answering all of the remaining causes of action set forth in the complaint herein and deny each and every of the allegations contained in each and every of the said various causes of action excepting insofar as said causes of action are identical with matters set forth in the first cause of action which are admitted. This answer as to the remaining causes of action is made in this form by agreement between the respective counsel, it being the purpose to answer each of the causes of action as fully and completely as the first cause of action has been answered.

Wherefore, defendants pray that they be hence dismissed with their costs.

JOHN F. NUGENT, S. H. HAYS & P. B. CARTER, attorneys for defendants, residing at Boise, Idaho.

(Duly Verified):

(Endorsed):

Filed —— A. M. —— P. M., May 1, 1914.

STEPHEN UTTER, Clerk.

By B. CLYDE EAGLESON, Deputy.

(Title of Court and Cause):

MOTION FOR NON-SUIT AND DIRECTED VERDICT MADE IN TRIAL COURT.

"MR. HAYS: If the Court please, at this time, we desire to renew our motion heretofore made for a non-suit and the ask the court upon the grounds heretofore given to grant a non-suit and further, to instruct the jury to find in favor of the defendant Surety company and also in favor of the defendant Platt, and we add the further ground that the legislature of the State of Idaho, if it had so intended, would have had the power or authority under the constitution of the State to authorize or permit the Bank Examiner to do those legislative, judicial and executive acts that may have been necessary in determining whether the bank was insolvent and thereafter close it without any judicial determination of any of those matters. That it is not within the power of the legislature to direct or authorize the officers to act in the way that it is claimed here that he should act. We also move to strike out all of the evidence which relates to any deposits in that bank or to any transactions out of which liability might accrue prior to the 25th day of November, 1911, for this reason. We desire to raise these points; if the commissioner was of the opinion that this bank was insolvent, under section seventy-two, he might give notice—he could have the power to call the bank to make good the impairment of its capital and the bank should thereafter have thirty days in which to do this so that any loss that arose by any impairment of the capital could only be charged up against the defendant here after a period of thirty days. No other amount could be charged up against him. Further, that there is no evidence here to

show that any loss accrued to the creditors or any of them by reason of the act of the defendant Platt or his failure to act; in other words, the statute does not provide that he must do a certain thing but provides that it is discretionary. Furthermore, if any claim is made under seventy-three of the statute, there is no showing of any kind that this Bank Commissioner had any notice that the bank had unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received. At that time, he had notice of any such facts."

(Argument omitted).

Court adjourned until Wednesday morning on August 5th, 1914, at 10:00 o'clock.

(Title of Court and Cause):

VERDICT.

We, the jury in the above entitled action, find: 1.. For the plaintiff and against the defendants in the first cause of action herein, to and for the use and benefit of O. W. Allen, and assess plaintiffs' damages in the first cause of action in the sum of $533.17.

(The remaining counts of the verdict being in words and legal effect identical with this first count, except the names of the party and the amount.)

(Signed): O. V. SEBERN, Foreman.

(Endorsed):

Filed A. M. 8:50 P. M., Aug. 5, 1914.

STEPHEN UTTER, Clerk.

By B. CLYDE EAGLESON, Deputy.

(Title of Court and Cause):

JUDGMENT.

This cause came on regularly for trial, Martin & Cameron appearing as counsel for plaintiff, and John F. Nugent, S. H. Hays and P. B. Carter, for the defendants. Whereupon a jury of twelve persons were duly selected, impaneled and sworn to try said cause; and witnesses on the part of the plaintiff and defendants were duly sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and said they found a verdict, which was accepted by the court and entered on the minutes, in favor of the plaintiff and against the defendants, Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, on each and every cause of action set forth in the complaint herein, to and for the use and benefit of each of the parties named in each of the separate causes of action set forth in plaintiff's complaint.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged and decreed that the said plaintiff do have and recover of and from the said defendants, Title Guranty and Surety Company of Scranton, Pennsylvania, and Vernon W. Platt, to and for the use and benefit of each of the following named parties, the sums, in lawful money of the United States of America, set opposite their respective names, to-wit:

Name.	Amount.
1. O. W. Allen	$533.17

(The remainder of the judgment consists of the names of the remaining use plaintiffs and opposite their names the respective sums awarded to them by the verdict.

No sum awarded to any use plaintiff equals $3000.00 but the aggregate of the sums awarded to all the use plaintiffs equals $30,240.98.)

Together with interest on each of said sums at the rate of seven per cent per annum from the date hereof until paid, to and for the use and benefit of each of said respective parties opposite whose name each sum is placed, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $302.00.

Dated August 5, 1914.

CHARLES P. McCARTHY, District Judge.

(Endorsed):

Filed 4:20 P. M., Aug. 6, 1914.

STEPHEN UTTER, Clerk.

By B. CLYDE EAGLESON, Deputy.

Book "K" Judgments, page 564.

(Title of Court and Cause):

NOTICE OF MOTION FOR NEW TRIAL.

To the Plaintiffs and Their Attorneys:

Please take notice that the defendants intend to move the court to set aside and vacate the judgment heretofore entered and rendered herein, and to grant a new trial of this case upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court, the jury and of the adverse parties. Failure of the jury to follow the instructions of the court.

2. Misconduct of the jury in arriving at a verdict by resorting to a determination of chance.

3. On the ground of accident and surprises which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the defendants which they could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages appearing to have been given under the influence of passion and prejudice.

6. Insufficiency of the evidence to justify the verdict of the jury; that the verdict is against the law.

7. The error in law occurring at the trial and excepted to by the defendants.

This motion will be made upon affidavits, the records and files in this cause and upon the minutes of the court.

The particulars in which the evidence is alleged to be insufficient are as follows:

1. That it was not shown at the time the Bank Commissioner, Vernon W. Platt, examined the Boise State Bank that he became satisfied that the capital of the bank was impaired or reduced below the amount required by law.

2. That it was not shown that the defendant, Vernon W. Platt had become satisfied that the Boise State Bank had unlawfully refused to pay its depositors in accordance with the terms in which said deposits were received.

3. That it was not shown that the bank was insolvent on the day that the defendant, Vernon W. Platt, examined the said Boise State Bank.

4. That it was not shown that the defendant Platt did not faithfully and impartially discharge the duties of his office and pay over to the persons entitled by law to receive it all money coming into his hands by virtue of his office.

5. No breach of duty was shown.

The errors in law occurring at the trial were:

1. Admitting books that were insufficiently identified into evidence.

2. Admitting into evidence plaintiffs' exhibits Nos. 3, 9 and 18.

3. Admitting into evidence plaintiffs' exhibit containing a resume of the deposits of the plaintiffs' between October 26, 1911, and December 19, 1911.

4. Admitting evidence of facts occurring prior to October 26, 1911.

5. Failure to grant motion for non-suit.

6. Failure of the jury to follow instructions of the court.

7. Refusing to give certain instructions for the defendant.

J. F. NUGENT, S. H. HAYS & P. B. CARTER, Attorneys for defendants, residing at Boise.

Service of copy of above notice accepted this 15th day of August, 1914.

MARTIN & CAMERON, attorneys for plaintiffs.

(Endorsed):

Filed —— A. M. —— P. M. Aug. 15, 1914.

STEPHEN UTTER, Clerk.

By THOS. E. POWELL, Deputy.

(Title of Court and Cause):

ORDER DENYING MOTION FOR NEW TRIAL.

The defendants' motion for a new trial in the above entitled action, heretofore made and filed herein, came on for hearing this 3rd day of October, 1914, before the Hon. Chas. P. McCarthy, District Judge; said motion was argued

by counsel for the respective parties herein and was submitted for decision the same day and the court being fully advised in the premises, it is hereby ordered,

That said motion for a new trial be and the same is hereby denied and overruled.

Dated this 3rd day of October, A. D. 1914.

CHARLES P. McCARTHY, District Judge.

(Endorsed):

Filed —— A. M.——P. M. Oct. 3, 1914.

STEPHEN UTTER, Clerk.

By B. CLYDE EAGLESON, Deputy.

(Title of Court and Cause.)

NOTICE OF APPEAL.

To Martin & Cameron, attorneys for plaintiffs:

You will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of Idaho, from the judgment therein entered in the said District Court on the 5th day of August, 1914, in favor of the plaintiffs in said action and against the defendants and from the whole thereof and also from the order denying said defendants' motion for new trial made and entered in the minutes of said court on the 3rd day of October, 1914.

JOHN F. NUGENT, S. H. HAYS & P. B. CARTER, attorneys for defendants, residing at Boise, Idaho.

Dated this 3rd day of October, 1914.

Service of copy of the above notice of appeal accepted this 3rd day of October, 1914.

MARTIN & CAMERON,

Attorneys for plaintiff.

Filed------A. M.------P. M., October 3, 1914.
STEPHEN UTTER, Clerk.
By B. CLYDE EAGLESON, Deputy.
(Endorsed):

DECISION OF THE IDAHO SUPREME COURT.

IN THE SUPREME COURT OF THE STATE OF IDAHO.

(Title of Cause.)

September term.

Filed October 2, 1915.

Jurisdiction—Amount in Controversy—Parties—Causes of Action—Misjoinder—Public Officers—Powers and Duties—Discretionary Powers—Constitutional Law—Action Prematurely Brought—Interest.

1. Where a state, as trustee of an express trust, sues to recover sums which, in the aggregate, exceed $3,000.00, exclusive of interest and costs, for and on behalf of certain depositors in a bank whose deposits have been lost as a result of the failure of the bank commissioner to perform his official duty and where the claim of no individual depositor amounts to $3,000, although diversity of citizenship exists between the parties to the action, a petition for removal to the federal court was properly denied.

2. In such case the state was plaintiff for the use and benefit of the depositors and properly united the several causes of action stated in the complaint since they arose out of contracts and the causes of action so united affect all parties to the suit and did not require different places of

trial. The demurrer to the complaint upon the ground of misjoinder of parties plaintiff and misjoinder of causes of action was properly overruled.

3. Where power is given by statute to a public officer in permissive language—as that he may do a certain thing—the language used will be regarded as peremptory if the public interest or individual rights require that it should be so regarded.

4. The law invests a bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and becomes satisfied that the bank has unlawfully refused to pay its depositors and has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close it, a duty the failure to perform which renders him and the surety upon his official bond liable to depositors who lose their money as a direct result thereof.

5. The provision of secs. 73 and 74, chap. 124, Sess. Laws, 1911, held, not to be in contravention of the 14th amendment of the constitution of the United States nor of sec. 13, art. 1 nor secs. 2 and 13, art. 5 of the constitution of Idaho.

6. The contention that an action has been prematurely brought cannot be successfully made for the first time upon appeal, but must be made first in the trial court.

7. In cases of this kind where the amount claimed is definite and certain or can be readily ascertained—of a character not wholly unliquidated—in the absence of a stipulation in the bond to the contrary and in the absence of a controlling statutory provision, interest begins to accumulate as against the surety on the bond at the same time as against the principal obligor. If a breach in the conditions

of the bond creates a debt on the part of the principal it becomes the debt of the surety as well and if it is unnecessary to make demand upon the one in order to start the interest period none need be made upon the other.

8. Where a statute imposes a duty upon one for the protection and benefit of others, and does not invest him with discretionary power in the matter, if he neglects to perform the duty he is liable to those for whose protection the statute is enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive, or otherwise.

Appeal from the District Court of the Third Judicial District in and for Ada county. Hon. Charles P. McCarthy, judge.

Action on official bond. Judgment for plaintiff. Affirmed.

J. F. Nugent, S. H. Hays and P. B. Carter, for plaintiffs; Martin & Cameron, for respondents.

MORGAN, J.

This action was commenced by the State of Idaho to recover on the official bond of Vernon W. Platt, former bank commissioner of Idaho, and the Title Guaranty and Surety Company of Scranton, Pennsylvania, his surety, for the use and benefit of O. W. Allen and 218 other depositors in the Boise State Bank, Limited, a separate cause of action being stated in the complaint on behalf of each of said depositors. The amount in dispute in each cause of action is separate and distinct from every other cause of action and none of the parties claimed any interest whatever in the

demand of any other depositor. In none of the causes of action does the State, as a trustee of an express trust, under the statute, ask for any individual depositor for as much as $3,0000, exclusive of interest and costs, the sum asked for each depositor being the amount of the balance due on his deposits between October 27, 1911, when it is alleged said bank commissioner, Platt, concluded an examination of the bank, and December 19, 1911, when he closed it.

It is alleged in the complaint that upon making his examination of the bank on the 25th, 26th and 27th of October, 1911, Platt became satisfied and knew its capital was impaired and reduced below the amount required by law and below the amount certified to the commissioner as paid in and that he failed, neglected and omitted to require its officers to make good such impairment or deficiency; that he became satisfied and knew it had unlawfully refused to pay one of its depositors in accordance with the terms on which the deposit was received; that he became satisfied and knew the bank was insolvent and that he failed, neglected and omitted to take charge of it and wind up its affairs as by law provided until the 19th of December, 1911. That by reason of his failure to perform his official duty in this behalf the persons for whose benefit this action was brought, believing the bank to be solvent, deposited therein various sums of money in amounts set out in the complaint.

The trial resulted in a verdict and judgment against the appellants, which judgment was rendered in favor of each of the beneficiaries named, for the several amounts found to be due them, the aggregate amount of which was $30,-240.98. From said judgment and an order denying a new trial this appeal is taken.

The appellants, in the preparation of their brief, have

failed to conform to rule 45 of the rules of practice in that it does not contain a distinct enumeration of the several errors relied on. However, we will undertake to dispose of the points presented for our consideration.

The appellants filed a petition for removal of the cause from the state court to the district court of the United States and alleged therein, among other matters, that the amount in dispute exceeded the sum or value of $3,000.00, exclusive of interest and costs; that the controversy was between citizens of different states; that the State of Idaho was but a formal or nominal plaintiff and that the parties for whose use and benefit the suit was brought were citizens of Idaho; that the defendant, Title Guaranty and Surety Company of Scranton, Pennsylvania, was a citizen of Pennsylvania, and that the defendant Platt was a citizen of Oregon. The petition for removal was denied and appellants contend that error was thereby committed.

It is true the amounts in the aggregate of the several separate causes of action, exclusive of interest and costs, are in excess of $3,000 and it is also true, and it appears from the complaint, that the money claimed to be due to no individual depositor amounted to that sum.

A number of authorities are cited by appellants in support of their contention that the cause should have been removed to the federal court, but it is believed they are all readily distinguishable from cases of this kind. What appears to be the correct rule is stated in case of Troy Bank v. Whitehead, 222 U. S. 39, as follows:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs

unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

See also Putney v. Whitmire, 66 Fed. 385; Gibson v. Shufeldt, 122 U. S. 27; Woodside v. Beckham, 216 U. S. 117; Farmers Loan and Trust Co. v. Waterman, 106 U. S. 265.

There is in this action, in one sense, a unity of interest which lies in the fact that all of the causes of action are upon the same bond and for the same breach thereof and on the same default or neglect of duty on the part of the bank commissioner and the bond runs to the State of Idaho to and for the use and benefit of all parties who are aggrieved by the breach thereof, but the depositors in the bank had separate and distinct demands against appellants, none of which amounted to enough to confer jurisdiction upon the federal court. Each of them might have brought a separate action, but it was not necessary for them to do so. The bond was given to and was made payable to the State of Idaho, the claims were united for convenience and economy, and suit was brought in the name of the State as trustee of an express trust. Therefore we conclude that the claims cannot be aggregated to make the requisite amount for federal jurisdiction.

Secs. 295 and 296, Rev. Codes, provide:

"Sec. 295: Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an ssignment thereof."

"Sec. 296: No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment recovered thereon by the State of Idaho, or by any person to whom a right of action has accrued, against such officer and his sureties, until the whole penalty of the bond is exhausted."

Sec. 4092, Rev. Codes, provides:

"An executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

If the other view be taken to the effect that the State is the real party in interest and the amounts could be aggregated for the purpose of federal jurisdiction, the jurisdiction of the federal court would be lacking as to diverse citizenship, since where the state is a party the case is not removable from a state to a federal court on the ground of diverse citizenship. Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962.

Where it appears that the state is a formal or nominal plaintiff only, then the citizenship of the state is not controlling as to federal jurisdiction. It is the citizenship of the real parties in interest that controls.

Appellants also contend that their demurrer should have been sustained upon the ground of misjoinder of parties plaintiff and misjoinder of causes of action in that no joint injury was shown to all the plaintiffs and no joint interest existed in the causes of action; that no cause of action whatever was stated on behalf of the State of Idaho.

What has already been said disposes of this contention. There could be no misjoinder of parties plaintiff for the state alone was plaintiff for the use and benefit of the depositors. There was no misjoinder of causes of action for sec. 4169, Rev. Codes, as amended by chap. 23, Sess. Laws, 1913, (p. 92) provides that the plaintiff may unite several causes of action in the same complaint where they arise out of contracts, express or implied, if the causes of action so united effect all the parties to the action and do not require different places of trial. While the State of Idaho was not beneficially interested, financially, in any of the causes of action in the complaint stated, it was the proper party plaintiff under sec. 4092, above quoted, for the use and benefit of the depositors in the bank. The demurrer was properly overruled.

At the close of respondents' case in chief appellants moved for nonsuit and at the close of the testimony upon the part of both parties a motion for a directed verdict in their favor was made upon the following grounds:

"1. That the evidence was insufficient to show liability on the part of the defendants.

"2. That there was no proof of loss or injury on the part of the plaintiffs caused by the defendant Platt for which the Surety company would be liable.

"3. That there was no evidence that Platt became satisfied that the capital of the bank was impaired, or that the bank was insolvent, or that he neglected any official duty in respect to the bank.

"4. That the closing of the bank was a matter of discretion or judgment and no recovery could be had against the defendant Platt in such a matter, and, therefore, no recovery against the Surety company.

"5. That there was no proof that the failure to close the bank arose from any corrupt motive or from malice, or any improper thing on the part of the defendant Platt.

"6. That the complaint does not state a cause of action and no proof beyond the complaint has been offered."

Their motions were denied by the court and appellants contend that the rulings thereon were erroneous. This contention seems to arise from a misinterpretation of the law.

This action is based upon the provisions of chap. 124, (p. 386) Sess. Laws, 1911. It becomes the duty of the bank commissioner, under sec. 72 of that chapter, upon being satisfied that the capital of any bank or trust company is impaired or reduced below the amount required by law or the articles of incorporation or below the amount certified to the commissioner as paid in, to require such bank or trust company to make good such impairment or deficiency. If any bank or trust company shall refuse or fail for thirty days after written notice to make good such impairment of or deficiency in its capital, the bank commissioner is authorized and empowered to take charge of its affairs and to wind up its business under the direction of the court in the judicial district in which the bank or trust company is located. Secs. 73 and 74 of said chapter provide:

"Sec. 73. On becoming satisfied that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received, or that any bank or trust company has become insolvent, the Bank Commissioner may forthwith take possession of the books, records and assets of every description of such bank or trust company and hold the same, and no action or proceeding shall be commenced or maintained

for the recovery of the possession of said books, records and assets, or to require a lien thereon except in the proceedings of the District Court having jurisdiction over the winding up of the affairs of said bank or trust company.

The Bank Commissioner shall at once proceed to collect all debts, dues and claims, and to sell or compound all doubtful debts, and to sell all real and personal property, on such terms as the court shall direct. Said Bank Commissioner shall pay over all money, by him received under the order of the court."

"Sec. 74. To carry out the provisions of sections 72 and 73, the Bank Commissioner is hereby authorized, and it is made his duty, to take charge of such bank or trust company personally or by his deputy, or by a special deputy appointed by the commissioner for that specific purpose; and the person so taking charge of the affairs of any such bank or trust company shall give a good and sufficient bond to be approved by the court. All expenses incident to such duties as are hereby imposed, including a per diem not to exceed ten dollars ($10), shall be paid under the order of the court out of the assets of the bank or trust company whose affairs are being administered, and the moneys so received shall, after providing for the compensation of a special deputy and all incidental expenses, be turned into the State treasury. The compensation of a special deputy, as herein provided for, shall not exceed that allowed regularly appointed deputies connected with the banking department."

It readily appears that if the capital of a bank is found to be impaired and its depleted condition does not amount to insolvency, is becomes the duty of the commissioner to give the notice provided for in sec. 72, but if he should be-

come satisfied that it has unlawfully refused to pay its depositors or that it has become insolvent it is his duty, although the law says he may do so, to forthwith take possession of its books, records and assets as provided for in sec. 73.

Where power is given by statute to public officers in permissive language—as that they may do a certain thing—the language used will be regarded as peremptory if the public interest or individual rights require that it should be so regarded. Supervisors v. United States, 4 Wall. 435; Hayes v. County of Los Angeles, 99 Cal. 74; State v Kent, 62 N. W. 631; Ralston v. Crittenden, 13 Fed. 508.

There was abundant evidence to justify the jury in reaching the conclusion that on October 27, 1911, Platt was satisfied the bank was insolvent and it is undisputed that he did not take possession of its books, records and assets until December 19th following; also that in the meantime the persons for whose use and benefit this action was brought deposited their money therein and that a considerable part of it was lost.

The law invests the bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and become satisfied that the bank has unlawfully refused to pay its depositors or has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close it, a duty the failure to perform which renders him and the surety upon his official bond liable to depositors who lose their money as a direct result thereof. State v. American Surety Co., 26 Ida. 652.

In their motion for a directed verdict appellants also

raised the question of the validity of sec. 73, above quoted. They contend that the law under consideration contemplates that a court proceeding must first be instituted by the bank commissioner before he takes possession of the books, records and assets of a bank or trust company found by him to be insolvent or which has unlawfully refused to pay its depositors; that the theory of respondents is, in effect, that it is the duty of the bank commissioner upon becoming satisfied of one or more of the above mentioned facts to immediately take charge without instituting a proceeding in court to procure judicial authority so to do. It is appellants' further contention that if said sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the 14th amendment of the constitution of the United States and of sec. 13, art. 1 and secs, 2 and 13, art. 5 of the constitution of Idaho. We are not in accord with appellants' contention. Clearly sec. 72 of the act in question contemplates that the bank commissioner shall, under the circumstances described therein, act under the direction of the district court. It is clear that secs. 73 and 74 contemplate that under circumstances described in sec. 73 he shall first take charge of the bank and then proceed in the district court to wind up its affairs.

It appears from the record in this case that Platt did neither of these things, but permitted the bank, without interference upon his part, although he knew it to be in an insolvent condition, to continue business for a period of a month and twenty-three days and to receive deposits of the persons upon whose behalf this action was prosecuted.

Appellants urge that since it appears there may and

probably will be other moneys distributed to the creditors of the bank when its assets can be realized upon, that this action is prematurely brought and cannot be maintained until the loss of each depositor has been determined after the affairs of the bank have been wound up. It does not appear that this contention was made in the district court and the question cannot be raised for the first time upon appeal. Atkinson v. Singer Mfg. Co., 53 N. Y. Supp. 117; Logan v. Slade, 28 Fla. 699; Johnson v. Meyer, 54 Ark. 442. Furthermore, should additional funds arise from the disposal of such assets as still remain in the hands of the receiver, the Surety company, upon payment of the judgment, may be subrogated to the rights of the persons in whose behalf this action is brought.

Appellants complain that the judgment includes interest from the date of closing the bank and that interest should only be allowed as against the surety from the date of demand upon it. It is alleged in the complaint and admitted in the answer that it would have been useless and vain to have demanded payment of the claims here sued upon from Platt; that he would have refused to pay and was unable to do so; that a demand was made upon the surety for payment and was refused, but no date of demand is fixed and none is shown in the evidence.

It is contended that the following instruction given by the trial judge is erroneous:

"If you find for the plaintiff on any of the causes of action, the measure of damages will be the amount deposited by any of the parties beneficially interested between th time when you find that the defendant Platt became satisfied that the bank was insolvent or had failed to pay its

depositors in accordance with the terms of their deposits, and failed to close the bank, if you so find, and the time when the bank was closed, minus any amount which you find such depositors have received as a dividend, or drew out before the bank closed, with interest upon such amount in the sum of 7 per cent per annum from the time of the respective deposits."

There is error in the instruction above quoted in that it contemplates the collection of interest upon the amount of each deposit made between the date Platt should have closed the bank and the date he did close it from the time of the deposit. Interest is only allowable from the date the bank was closed. This error was cured by the verdict for it appears that the jury allowed interest upon these deposits from the date of the closing of the bank instead of from the dates the deposits were made.

There is lack of harmony among the authorities as to the time interest begins to run against the surety upon a bond. It is decided in some cases that a surety is not liable for interest prior to demand made for payment and that in the absence of such demand the interest period commences with the filing of the action to recover the principal debt. Other cases hold that interest may be allowed against the surety from the date of the breach in the conditions of the bond even though by so doing the judgment exceeds the amount specified in the bond as the penalty thereof. In this case the amount of the judgment is less than the penalty of the bond so that question does not arise here.

The reasonable rule seems to be that in cases of this kind where the amount of the claim is definite and certain or can be readily ascertained—of a character not wholly un-

liquidated—in the absence of a stipulation in the bond to the contrary and in the absence of a controlling statutory provision, interest begins to accumulate as against the surety at the same time as against the principal obligor. If a breach in the conditions of a bond creates a debt on the part of the principal it becomes the debt of the surety as well and if it is unnecessary to make demand upon the one in order to start the interest period none need be made upon the other. Clark v. Wilkinson, 18 N. W. 481; Where-at v. Ellis, 79 N. W. 417; Thomssen v. Hall Co. 89 N. W. 389; Lumber Co. v. Peterson & Sampson, 124 Ia. 599.

Each depositor was entitled to receive from the bank on the date it suspended business the full amount of the balance due on his deposit made subsequent to October 27, 1911, and is entitled to interest thereon at the rate of 7 per cent. per annum from the date of its suspension until paid. A depositor has exactly the same right to his interest under these circumstances as he has to his principal and the loss of both principal and interest, due to the failure of the bank commissioner to discharge his duty are elements of damage of which hs failure is the proximate cause and are covered by his official bond. The amounts of the deposits were definite and certain and tender of payment might have been made by Platt or his surety immediately upon the failure of the bank in which event no interest would have accumulated.

Complaint is made that the court refused to give to the jury certain instructions asked for by appellants; that the instructions given did not clearly state the law, particularly with respect to the intent and motive which actuated Platt in neglecting and refusing to close the bank when he found

it to be insolvent. We have carefully examined these instructions and find no error therein, except the one above quoted, which, as heretofore indicated, was cured by the verdict. Instructions V and VI contain such a clear statement of the law relative to the duty of a bank commissioner in cases of this kind they will be here quoted:

"V. Whenever a statute imposes certain duties upon an executive officer like a bank commissioner, and directs that he shall use his discretion in passing upon certain matters, he is not liable for a mere mistake in judgment or opinion committed by him in exercising such discretion. Accordingly, if the bank commissioner in the exercise of his discretion shall merely make a mistake in passing judgment upon the question of whether or not the capital of a bank was impaired and reduced below the amount required by law, or upon the question as to whether or not the bank had unlawfully refused to pay a depositor in accordance with the terms of his deposit, or upon the question as to whether said bank had become insolvent, such bank commissioner would not be liable for such mistakes in judgment, no matter what might be the consequences."

"VI. However, if upon exercising his discretion and using his own judgment, the bank commissioner of the state becomes satisfied in his own mind that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms of their deposits, or that such bank has become insolvent, it becomes his duty to forthwith take possession of the books, records and assets of every description of such bank and hold the same, and to collect all debts, dues and claims and sell or compound all doubtful debts and to sell all real and personal property on such terms as the court of said judicial district shall direct."

Where a statute imposed a duty upon one for the protection and benefit of others and does not invest him with discretionary power in the matter, if he neglects to perform the duty he is liable to those for whose protection the statute was enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive, or otherwise. Baxter v. Coughlan, 72 N. W. 797; Throop on Public Officers, sec. 724.

In case of Amy v. Supervisors, 11 Wall. 136, Mr. Justice Swayne, delivering the opinion of the supreme court of the United States, said:

"The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authority to this effect. A mistake as to his duty and honest intention will not excuse the offender."

It follows that the surety upon the official bond of such officer given to secure the faithful performance of his duty is also liable. People v. Gardner, 55 Cal. 304; People v. Smith, 55 Pac. 765; State v. American Surety Co., supra.

We find no reversible error in the record and the judgment of the trial court is accordingly affirmed. Costs are awarded to the respondents.

BUDGE, J., concurs.

(Title of Court and Cause):

REMMITTITUR TO STATE DISTRICT COURT FROM THE SUPREME COURT OF IDAHO.

On an appeal from the District Court of the Third Judicial District, in and for Ada county.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Morgan to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court, that the judgment of the District Court of the Third Judicial District in and for the county of Ada in the above entitled cause be and the same hereby is affirmed. Costs awarded to respondents, in the sum of $54.50.

I, I. W. Hart, clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 2nd day of October, 1915, and now remaining of record in my office.

Witness my hand and seal of the court, affixed at my office, this 2nd day of October, 1915.

(Seal) I. W. HART, Clerk.

(Endorsed): Filed Oct. 27, 1915.

STEPHEN UTTER, Clerk.
By OTTO G. PETERSON, Deputy.

IN THE SUPREME COURT OF THE STATE OF IDAHO, JANUARY TERM, 1915.

(Title of Cause):

ASSIGNMENT OF ERRORS.

Now comes the above defendants and appellants and file herewith their petition for a writ of error and say that there are errors in the records and proceedings of the above entitled cause and for the purpose of having the same re-

viewed in the Supreme Court of the United States, make the following assignment:

The Supreme Court of Idaho erred in holding and deciding that the petition filed by the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, for the removal of this action to the District Court of the United States for the District of Idaho, southern division, was properly denied. The right of the defendants and appellants to remove the above entitled action to the federal court was denied and drawn in question by the defendants and the appellants on the ground that the suit was of a civil nature at law and that the controversy was wholly between citizens of different states which could be fully determined as between them, and that the amount in controversy exceeded the sum of three thousand ($3,000.00) dollars, exclusive of interest and costs, and that the diversity of citizenship existed when the suit began as well as at the time the application for a removal was made.

The real plaintiffs in this action are the parties for whose use and benefit this action was brought, all being citizens of the State of Idaho. The State of Idaho is merely the nominal plaintiff and the defendants, the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, were at the time of the commencement of the action and at the time of the filing of the petition for removal citizens of Pennsylvania and Oregon respectively. That the decision of the Supreme Court of Idaho was against the right and privilege as provided for in section 709 of the Revised Statutes of the United States, and section 28 of the Judicial Code of the United States.

The Supreme Court further erred in holding and deciding that the provisions of sections 72, 73 and 74, c. 124 Idaho Session Laws of 1911, were valid. The validity of said sections was denied and drawn in question by the defendants and appellants on the ground of their being repugnant to the constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Idaho erred in holding and deciding:

1: That the amount in controversy in this action is determined by the individual claims of the use plaintiffs separately and not in the amount sued for in the aggregate of the several causes of action.

2. That said sections 72, 73 and 74, c. 124 Session Laws of 1911 of the State of Idaho were not in contravention of the fourteenth amendment of the constitution of the United States, in depriving persons of property without due process of law.

"For which errors the defendants, the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, pray that the said judgment of the Supreme Court of the State of Idaho, dated October 2nd, 1915, be reversed and a judgment rendered in favor of the defendants and appellants and for costs."

JOHN F. NUGENT, SAMUEL H. HAYS, PASCO B. CARTER, attorneys for Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt.

(Endorsed): Filed this 27th day of Nov., 1915.

I. W. CLARK, Clerk.

IN THE SUPREME COURT OF THE STATE OF IDAHO. JANUARY TERM, 1915.

(Title of Cause)

PETITION FOR WRIT OF ERROR

To the Honorable Isaac N. Sullivan, Chief Justice of the Supreme Court of Idaho:

The petition of the Title Guaranty and Su rety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt hereby sets forth that on or about the 2d day of October, 1915, the Supreme Court of the State of Idaho made and entered a final order and judgment herein in favor of the plaintiffs and respondents and against the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, in the above entitled case, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the Title Guaranty and Surety Company of Scranton, Pennsyvania, a corporation, and Vernon W. Platt, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of Idaho is the highest court of the said state of Idaho in which a decision in this suit and this matter could be had.

Wherefore, The Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt petition and pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Idaho for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly

authenticated may be sent to the Supreme Court of the United States.

Dated this 24th day of November, A. D. 1915.

JOHN F. NUGENT,
SAMUEL H. HAYS,
P. B. CARTER,

Attorneys for Title Guaranty and Surety Company, of Scranton, Pennsyvania, a corporation and Vernon W. Platt.

State of Idaho, Supreme Court: ss.

Let the writ of error issue upon the execution of a bond by the Title Guaranty and Surety Company of Scranton, Pennsyvania, a corporation, and Vernon W. Platt, to the State of Idaho, to and for the use and benefit of O. W. Allen, and all the other plaintiffs mentioned in the complaint for whose use and benefit the action was brought, in the sum of forty-five thousand ($45,000.00) dollars; such bond, when approved, to act as a supersedeas.

Dated 27th day of November, 1915.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

(Endorsed): Filed this 27th day of November, 1915.

I. W. HART,
Clerk.

IN THE SUPREME COURT OF THE STATE OF IDAHO, JANUARY TERM, 1915.

(Title of Cause.)

BOND.

Know all men by these presents: that we, the Title Guaranty and Surety Company of Scranton, Pennsylvania,

a corporation, and Vernon W. Platt, by their attorney, P. B. Carter, as principals, and the Aetna Accident and Liability Company, a corporation as surety, are held and firmly bound unto the State of Idaho, to and for the use and benefit of O. W. Allen, and the other plaintiffs mentioned in the complaint for whose use and benefit the action was brought by the said State of Idaho, in the sum of forty-five thousand ($45,000.00) dollars, to be paid to the said State of Idaho, to and for the use and benefit of O. W. Allen, and the other plaintiffs mentioned in said complaint, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents;

Sealed with our seals and dated this 27th day of November, 1915.

Whereas, The above named plaintiffs in error seek to prosecute their writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho,

Now, Therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages not to exceed $45,000.00 if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

By Joseph Perrault, Jr.

Attest: ALFRED A. FRASER,
Resident Asst. Secretary.

P. B. CARTER,

Attorney for Title Guaranty and Surety Company of Scranton, Pennsyvania, and Vernon W. Platt.

Bond approved and to operate as a supersedeas.

Dated November 27th, 1915.

ISAAC N. SULLIVAN,

Chief Justice, Supreme Court of Idaho.

(Endorsed): Filed this 27th day of November, 1915.

I. W. HART,

Clerk.

CITATION.

The United States of America: ss.

The President of the United States to the State of Idaho, to and for the use and benefit of O. W. Allen, and the other plaintiffs stated in the complaint, Boise, Idaho: Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the state of Idaho, wherein the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of Idaho, this 27th day of November, 1915.

ISAAC N. SULLIVAN,

Chief Justice, Supreme Court of Idaho.

Attest: I. W. HART,
(Seal.) Clerk, Supreme Court of Idaho.

Boise, Idaho, Nov. 27th, 1915.

We, attorneys of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter our appearance in the Supreme Court of the United States.

JOSEPH H. PETERSON,
Attorney General of the State of Idaho.
MARTIN & CAMERON,
Attorneys for Defendants in Error.

(Endorsed): Filed on return this 27th day of November, 1915.

I. W. HART,
Clerk.

WRIT OF ERROR.

The United States of America: ss.

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Idaho.

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Idaho, to and for the use and benefit of O. W. Allen, et al., and the Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, wherein was drawn

in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Title Guaranty and Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 24th day of November, in

the year of our Lord one thousand nine hundred and fifteen.

(Seal) W. D. McREYNOLDS,

Clerk, District Court United States, District of Idaho.

Allowed, November 27th, 1915.

ISAAC N. SULLIVAN,

Chief Justice, Supreme Court of Idaho.

(Endorsed): Filed this 27 day of Nov., 1915.

I. W. HART, Clerk of Supreme Court of Idaho.

IN THE SUPREME COURT OF THE STATE OF IDAHO. JANUARY TERM, 1915.

(Title of Cause.)

CERTIFICATE OF LODGMENT.

Supreme Court, State of Idaho:

I, I, W, Hart, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on the 27th day of November, 1915, in the matter of the Title Guaranty & Surety Company of Scranton, Pennsylvania, a corporation, and Vernon W. Platt, Plaintiffs in Error, vs. the State of Idaho, to and for the use and benefit of O. W. Allen, and the other plaintiffs mentioned in the complaint, Defendants in Error:

1st. The original bond of which a copy is herein set forth.

2nd. Three copies of the writ of error as herein set forth —one for each defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in my office in Boise, Idaho, this November 27th, 1915.

(Seal) I. W. HART,

Clerk Supreme Court of Idaho.

(Endorsed): Filed this 27 day of Nov. 1915.

I. W. HART, Clerk.

In the Supreme Court of the United States

DECEMBER TERM, 1915.

TITLE GUARANTY AND SURETY COMPANY OF SCRANTON, PENNSYLVANIA, a Corporation, and VERNON W. PLATT,

Plaintiffs in Error.

vs.

STATE OF IDAHO to and for the use and Benefit of O. W. ALLEN ET ALS.,

Defendants in Error.

In Error to the Supreme Court of the State of Idaho

REPLY BRIEF OF DEFENDANTS IN ERROR ON MOTIONS TO DISMISS WRIT OF ERROR, OR AFFIRM, OR ADVANCE

JOSEPH H. PETERSON,
Attorney General of the State of Idaho.
PARIS MARTIN,
WILLIAM E. CAMERON,
All of Boise, Idaho,
Attorneys for Defendants in Error.

In the Supreme Court of the United States

DECEMBER TERM, 1915.

TITLE GUARANTY AND SURETY COMPANY OF SCRANTON, PENNSYLVANIA, a Corporation, and VERNON W. PLATT,

Plaintiffs in Error.

vs.

STATE OF IDAHO to and for the use and Benefit of O. W. ALLEN ET ALS.,

Defendants in Error.

In Error to the Supreme Court of the State of Idaho

REPLY BRIEF OF DEFENDANTS IN ERROR ON MOTIONS TO DISMISS WRIT OF ERROR, OR AFFIRM, OR ADVANCE

The defendants in error first wish to make certain corrections in the statement as set forth in the brief of plaintiffs in error, beginning at the last paragraph on page 2 thereof, not that the facts are brought here for review, but in the interest of accuracy and for the reason that when the jury passed upon the facts in this case, and when the

State trial court entered judgment on the verdict as a conclusion upon the facts, and when the trial court refused to grant a motion for a new trial, and when the State Supreme Court passed upon the record after argument of counsel, and study of the record, it is quite reasonable, we think to argue that the courts of Idaho and a part of its people, as represented by the jury, put their stamp of approval upon the sections of the banking act of Idaho which provide that an insolvent bank shall be closed at once upon its discovery by the bank commissioner, and shall not be allowed to remain open as a trap and pitfall for depositors at the very time when they are depending upon the bank examiner of the State to protect them against just such places.

And we think this Court will believe that when the Supreme Court of the State of Idaho said in its opinion in this case, as shown in the transcript of the record attached to the back of the opening brief of defendants in error, at page 94 thereof, that "There was abundant evidence to justify the jury in reaching the conclusion that on October 27, 1911, Platt was satisfied the bank was insolvent, and it is undisputed that he did not take possession of its books, records and assets, until December 19th following; also that in the mean time the persons for whose use and benefit this action was brought deposited their money therein and a considerable portion of it was lost"—that such a statement by the Supreme Court of the State of Idaho ought to brand the excuses of the bank examiner that he was trying to sell the hopelessly wrecked and in-

solvent bank to some one, or to rehabilitate it in some other way, as either not believed in fact, or not a compliance with the law of Idaho which makes it the mandatory ministerial duty of the bank examiner to close an insolvent bank forthwith and immediately take steps in the proper court for its liquidation.

REMOVAL TO UNITED STATES COURT.

Upon the question of the removability of this cause to the Federal court, on page 5 of the brief of plaintiffs in error, they state: "The judgment, therefore, is in favor of the State for the use and benefit of certain individuals in the aggregate amounting to over $30,000.00."

In reading this we should bear in mind that it is alleged in the complaint and proved, and in no place in the proceedings denied, that the claim of each individual depositor was distinct from the claims of the other depositors and that no depositor claimed any right, title or interest in the deposit of any other depositor, and that no depositor claimed through the State of Idaho, suing as trustee of an express trust as provided in Section 4092 of the Revised Codes of Idaho (1907), a sum as great as $3000.00.

Again, in the first paragraph on page 6 of their brief, plaintiffs in error state that "In discussing this question of of the amount in controversy, however, the Supreme Court of the State failed to take into consideration the effect of their holding that there was but a single plaintiff." But plaintiffs in error ignore the facts as pleaded in the complaint and as proved and as no where denied, that the amount in controversy was separate and distinct in each

cause of action, that the proof as to the amount in one cause of action as it concerned but the one depositor in that cause of action might have failed without affecting the amount in controversy in any other cause of action. The amount in controversy in each cause of action, whether we regard the State as suing for the use and benefit of the depositor in that particular cause of action or we regard the depositor as the real party in interest suing for himself in that particular action, is less than $3000 in each cause of action, and is separate and distinct from all of the other causes of action and the amounts therein named. One cause of action might fail or a dozen causes of action might fail because the proof might be wanting that the certain depositors in these causes of action had deposited the amounts set forth in these actions; yet the amounts in controversy in the remaining causes of action would remain undisturbed for the reason that the amount in controversy in any of the remaining causes of action was in no way dependent upon the amount in controversy in any other cause of action.

Plaintiffs in error state just below the middle of page 6 in their brief in their endeavor to distinguish the case of Troy Bank vs. Whitehead, 22 U. S. 39: "Instead it is a case where a single plaintiff obtains a single judgment and although the same is for the benefit of numerous other persons, the amount in controversy is the amount of the entire judgment."

We should not lose sight of the fact that although the judgment may have been a single judgment in the sense

that it was one instrument instead of being 219 separate judgments, one for each depositor, that in substance it was really 219 judgments in that the State of Idaho took judgment to and for the use of O. W. Allen for $500.00, and the State of Idaho took judgment to and for the use and benefit of Alexander Realty Company for $139.96, and so on throughout the whole instrument, setting forth the separate names and the separate and distinct amounts on each and every cause of action. The Court, we think, will look at the substance and will see that in reality these were practically separate judgments for amounts, each of which were less than the jurisdictional amount of $3000.00. And the Court will not say that because the defendants in error did not go through the form of making out and filing 219 separate and distinct judgments that the amounts in controversy should be aggregated Such was not the intention, and the judgments, though combined in one instrument, plainly retain their separate and distinct provisions for each and every distinct and separate claim.

In the last paragraph on page 6 of their brief, plaintiffs in error state "The bond was the common security of all persons for whose benefit the action was brought. There was only one breach of the bond and there was only one default or neglect of duty. The claims were not united for convenience and economy in the sense in which the phrase is used in the decisions of this Court."

Plaintiffs in error have themselves stated in this paragraph why these actions were joined for convenience, and have almost shown a practical necessity. It is very evi-

dent that if each depositor must sue for the breach of the same bond, even though the damage to each depositor was separate and distinct, that as a matter of convenience it would be much simpler to join the actions of all the depositors and have the witnesses present and put in the proof but once. Where the amounts due the individual depositors and claimants were so numerous and so small any other method would be so inconvenient, impractical and bunglesome as to make it almost prohibitive, and so expensive in many of these claims as to make such a course as the one pursued absolutely necessary.

On page 8 of their brief, plaintiffs in error make the following statement:

> "As to the amount in controversy, since the statute makes the State the trustee of an express trust and authorizes the bringing of suits without joining the beneficiaries, and the judgment running to the State for an amount exceeding $30,000.00, the amount in controversy was sufficient to give jurisdiction."

This statement carries the assumption that "the judgment runs to the State for an amount exceeding $30,000.00." This statement is not borne out by the record. The judgment runs to the State to and for the use and benefit of the first named depositor for one amount, then to the State to and for the use and benefit of another depositor for another amount, and so on through each and every separate cause of action, and in each instance the amount set forth is less than $3000.00.

THE CONSTITUTIONAL QUESTION.

In their brief, on page 10, plaintiffs in error quote that portion of the opinion of the Idaho Supreme Court which

says: "It is clear that Sections 73 and 74 contemplate that under the circumstances described in Section 73, ***he shall first take charge of the bank*** and then proceed in the district court to wind up its affairs."

Then plaintiff in error says "This is exactly what we complain of."

On page 11 of their brief plaintiffs in error make this statement:

> "For the reason that Section 73 of the banking act did not provide for any notice to the bank or any judicial proceedings whatever in determining the insolvency of the bank, or whether or not it had paid its depositors in the ordinary course of business, we contend that the act was unconstitutional and that the question is fairly before this Court for determination."

The Idaho Supreme Court never passed on this particular question, but assuming for the sake of argument that the question is one which this surety company and Platt have a right to raise at this time, and that "the question is fairly before this Court for determination," yet it is clearly without merit.

This very identical constitutional question was decided adversely to the contention of plaintiffs in error by this Court in the case of State Savings & Commercial Bank, plaintiff in error, v. Alden Anderson et al., 238 U. S. 611, 59 L. Ed. 1488.

This Court apparently did not consider that there was enough merit in this question to warrant the writing of an extended opinion, but simply affirmed the decision of

the California Supreme Court "upon the authority of Engel v. O'Malley, 219 U. S. 128, and Noble State Bank v. Haskell, 219 U. S. 104."

In the State Savings & Commercial Bank case, supra, this constitutional question was fairly before this Court because it was raised *by a State bank* claiming that it was being deprived of its property without due process of law.

Plaintiffs in error make no answer to the argument contained in our opening brief to the effect that plaintiffs in error cannot complain in this court because the Idaho banking act might be construed to deprive a state *bank* of property without due process of law.

We therefore assume that plaintiffs in error concede the correctness of our position that such an objection could only be urged by the State bank or by some one representing or interested in the bank.

In conclusion, we again submit that the claims in the various causes of action in our complaint should not be aggregated for the purpose of making up an amount sufficient to confer jurisdiction upon a Federal court, because these claims are separate and distinct and separately owned, and are joined in the one complaint simply for convenience and economy in litigation; that such a practice has not injured plaintiffs in error and that they are in no worse position than if we had filed 219 separate complaints; that the constitutional question they raise is clearly without merit, and that, moreover, *they* are not being deprived of propery without due process of law and

are therefore not entitled to raise this constitutional question in this Court.

We again ask this Court to dismiss this writ of error or affirm the judgment from which it is taken, and failing that, to advance the cause for argument.

Respectfully submitted.

JOSEPH H. PETERSON,
Attorney General of the State of Idaho.

PARIS MARTIN,
WILLIAM E. CAMERON,
Attorneys for Defendants in Error.

ACCEPTANCE OF SERVICE BY PLAINTIFFS IN ERROR.

On this 18th day of January, 1916, at Boise, Idaho, we acknowledge to have been served upon us and to have received three printed copies from Paris Martin and William E. Cameron of the within reply brief of defendants in error in the cause entitled on the cover hereof.

SAMUEL H. HAYS,
JOHN F. NUGENT,
PASCO B. CARTER,
Attorneys and Counsel for Plaintiffs in Error.

TITLE GUARANTY AND SURETY COMPANY *v.* STATE OF IDAHO FOR THE USE OF ALLEN.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 815. Motion to dismiss or affirm submitted January 24, 1916.—Decided February 21, 1916.

Where the State, suing on behalf of depositors of a bank, is an actual party plaintiff, the case cannot be removed to the Federal court. *Missouri &c. Ry.* v. *Commissioners*, 183 U. S. 53.

Where a State, suing on behalf of depositors of a bank, is merely a nominal party, the case cannot be removed if none of the distinct judgments to be rendered in favor of any individual is large enough to confer jurisdiction: the amounts cannot be aggregated for that purpose. *Rogers* v. *Hennepin County*, 239 U. S. 621.

The due process provision of the Fourteenth Amendment does not prevent a State from placing upon a bank commissioner the duty of closing a bank found upon examination to be insolvent without first instituting proceedings and obtaining an award.

THE facts, which involve the right of removal of a cause from the state court to the Federal court on grounds of diversity of citizenship and of amount in controversy and the constitutionality under the due process provision of the Fourteenth Amendment of certain provisions of the Idaho Banking Law, are stated in the opinion.

Mr. Joseph H. Peterson, Attorney General of the State of Idaho, *Mr. Paris Martin* and *Mr. William E. Cameron* in support of the motion to dismiss or affirm.

Mr. John F. Nugent, Mr. Samuel H. Hays and *Mr. P. B. Carter* for plaintiff in error in opposition to the motion:

The action is brought by the State of Idaho for the use and benefit of some two hundred and eighteen persons who were depositors in the Boise State Bank and while no individual item is in excess of $3,000 the total amount is $30,000.

The judgment, therefore, is a judgment in favor of the State for the use and benefit of certain individuals in the aggregate amounting to over $30,000, and while no individual item is in excess of $3,000, the total amount is over $30,000.

Under § 4092, Idaho Rev. Codes, the State is the trustee of an express trust under this bond and may therefore properly sue without joining the persons for whose benefit the action is prosecuted. For this reason the State brings a single action for the entire amount and not upon the ground of convenience or economy. See *Troy Bank* v. *Whitehead*, 222 U. S. 39.

There is no case exactly like the one at bar. The bond was the common security of all of the persons for whose benefit the action was brought.

There was only one breach of the bond and there was only one default or neglect of duty.

The claims sued on were not united for convenience and economy in the sense in which that phrase is used in the decisions of this court, but were united entirely on the ground that the State was the proper plaintiff in the suit under the specific statute which made the presence of the beneficiaries unnecessary.

The State is seeking to recover the entire fund deposited. The aggregate amount, therefore, is to be taken in ascertaining the amount in controversy. *Handley* v. *Stutz*, 137 U. S. 366. See also, *Balt. & Ohio R. R.* v. *United States*, 220 U. S. 94; *Kaus* v. *Am. Surety Co.*, 199 Fed. Rep. 972; *Spokane Co.* v. *Kootenai Co.*, 199 Fed. Rep. 481; *Jones* v. *Mutual Fidelity Co.*, 123 Fed. Rep. 506.

The plaintiff is the State of Idaho, but is only a nominal party; therefore, the question of citizenship is that of the real parties in interest, and as they are citizens of Idaho, and as the defendants are citizens of other States jurisdiction exists. *New Orleans* v. *Whitney*, 138 U. S. 595; *Mex. Cent. Ry.* v. *Eckman*, 187 U. S. 429.

The judgment cannot be divided up into parts to defeat jurisdiction on the question of the amount in controversy.

No objection to the verification of the petition for removal was made at the time of the trial, and the order denying the petition was made on the merits. The verification was sufficient. *Cropsey* v. *Sun P. & P. Ass'n*, 215 Fed. Rep. 132; *Murray* v. *South. Bell Tel. Co.*, 210 Fed. Rep. 925; *Porter* v. *Nor. Pac. Ry. Co.*, 161 Fed. Rep. 773.

The constitutional question, to-wit, § 73 of the Idaho Banking Act was unconstitutional in that it did not provide for due process of law, was urged and decided adversely to the plaintiff in error.

Section 73 does not provide for any notice to the bank or any judicial proceedings whatever in determining the insolvency of the bank, or whether or not it had paid its depositors in the ordinary course of business, and in that respect is unconstitutional as denying due process of law in providing for a hearing. *C., M. & St. P. R. R.* v. *Minnesota*, 134 U. S. 418.

A state bank is in a different position from a National bank. The National banks are instrumentalities of the Federal Government created for a public purpose and as such necessarily subject to the paramount authority of the United States. They are in a sense a part of the treasury department. State banks occupy no such relation to state affairs. There is no arbitrary right of a bank commissioner to close state banks nor is there any statute in Idaho similar to the Federal Act.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The case is before us on a motion to dismiss or affirm. The action of the court below which it is sought to review affirmed a judgment of the trial court entered on the verdict of a jury in a suit brought by the State for the use and benefit of O. W. Allen and two hundred and eighteen other named depositors of the Boise State Bank against Platt, a state bank commissioner, and the surety on his bond, for losses alleged to have been suffered by each of the individuals named as the result of alleged neglect of official duty imposed by the state law upon the bank commissioner. The wrong relied upon was his alleged misconduct in not closing the doors of the bank and permitting it to continue business after he had discovered, as the result of an official examination, that the bank was hopelessly insolvent. The bill as a first cause of action fully set out the facts and stated the legal grounds relied upon to establish the loss and right of O. W. Allen to recover, and separate causes of action were then stated in favor of each of the two hundred and eighteen other depositors. There was an application to remove the case to the District Court of the United States on the grounds of diverse citizenship, the depositors named being citizens of Idaho and Platt the bank commissioner, being then a resident of California and the Surety Company of Pennsylvania, which application was denied. After issue joined there was a trial before a jury and a verdict in favor of the plaintiff, the State, and against the defendants "on each and every cause of action set forth in the complaint herein, to and for the use and benefit of each of the parties named in each of the separate causes of action set forth in plaintiff's complaint." And it was conformably adjudged "that the said plaintiff do have and recover of and from the said defendants . . . for the

use and benefit of each of the following-named parties, the sums set opposite their respective names, to wit," etc. No one of the amounts thus awarded to the plaintiff for the use of any one of the named persons equalled three thousand dollars, but the sum of all the claims equalled thirty thousand dollars. In affirming the judgment the court below held that the relief prayed was authorized by the state statutes and that they also conferred authority upon the State to bring the suit as an express trustee for the use and benefit of the respective parties.

The Federal questions relied upon are first, the alleged wrongful denial of the right to remove, and second, an asserted error committed by the court below in refusing to sustain a claim under the due process clause of the Fourteenth Amendment.

The first is plainly without merit. Treating the State as the party plaintiff, it is not open to question that there was no right to remove. *Stone* v. *South Carolina*, 117 U. S. 430; *Missouri &c. Ry.* v. *Missouri R. R. Commissioners*, 183 U. S. 53, 58. And if we were to accede to the contention made in argument that the State must be treated as merely a nominal party and the right to remove be then determined by the citizenship of the individuals for whose benefit recovery was allowed, it would yet follow, since none of the distinct judgments in favor of any of the individuals are large enough to confer jurisdiction, that the court below correctly held that there was no basis for the right to remove. *Woodside* v. *Beckham*, 216 U. S. 117; *Troy Bank* v. *Whitehead*, 222 U. S. 39; *Rogers* v. *Hennepin County*, 239 U. S. 621. In fact the correctness of these conclusions is made clear by the arguments advanced to the contrary, since they serve only to confuse and are destructive of each other. Thus, on the one hand, for the purpose of establishing the existence of diversity of citizenship justifying the removal it is urged that the State must be treated as merely a nominal party having

no interest and as in no wise concerned in the judgment, and then upon the hypothesis that the State is eliminated, in order to establish a jurisdictional amount sufficient to remove, the award of distinct and separate amounts made by the judgment in favor of each of the distinct plaintiffs is wholly ignored and it is urged that there is but one judgment which is in favor of the State and which is composed of the aggregate of the distinct amounts.

Second. The proposition under the Fourteenth Amendment relied upon is that consistently with that Amendment the State had not the power to put upon the bank commissioner the duty of closing the bank in case on examination it was found to be insolvent, since such authority consistently with due process could only have been exerted after judicial proceedings to ascertain the facts and the awarding of relief accordingly. The pleadings leave it exceedingly doubtful whether the question thus urged was presented in either of the courts below, and it is besides obvious from the opinion of the court below that it considered that the only question raised under the Constitution of the United States was a contention that there would result a want of due process if the state statutes conferred upon an administrative officer the authority to liquidate the affairs of the insolvent bank without judicial proceedings. We say this because in its opinion the court observed that if that was the contention, it was irrelevant, as the statutes did not authorize liquidation except as a result of judicial proceedings, although they did impose upon the bank commissioner the duty, after he found a bank to be insolvent, to close its doors and prevent the further transaction of business until, in the orderly course of procedure, a judicial liquidation might be accomplished. But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the Fourteenth Amendment because

power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Shallenberger* v. *First State Bank*, 219 U. S. 114.

Dismissed for want of jurisdiction.